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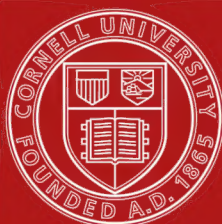
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A SELECTION OF CASES
ON
THE LAW OF TORTS.

VOLUME II.

A SELECTION OF CASES
ON
THE LAW OF TORTS.

BY
JAMES BARR AMES AND JEREMIAH SMITH.

VOLUME II.

By JEREMIAH SMITH,
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SELECT CASES ON TORTS.

CHAPTER I.

LEGAL CAUSE.

THE LORDS BAILIFF-JURATS OF ROMNEY MARSH *v.* THE CORPORATION OF THE TRINITY HOUSE.

1870. *Law Reports*, 5 *Exchequer*, 204.¹

SPECIAL CASE stated in an action for negligence tried before Cockburn, C. J., at Maidstone, on the 10th of March, 1869, in which a verdict was found for the plaintiffs for £93, subject to the opinion of the Court on a special case.

The first count of the declaration charged the defendants with unskilful and negligent navigation of their ship by their servants, whereby the same was wrecked, and ran foul of and injured a sea wall of the plaintiffs'.

By their pleas the defendants traversed all the averments in the declaration.

The facts stated in the case were as follows. On the 30th of November, 1867, the defendants' pilot cutter *Queen*, through the negligence of her captain and crew, struck upon a shoal about three quarters of a mile out from the Dymchurch wall, a sea wall owned and repaired by the plaintiffs. It was then blowing hard, and there was a flood tide; and in consequence, after the vessel struck, the captain and crew lost all control over her, and she gradually drifted towards the shore, and was at last driven against the wall. If the weather had been moderate and the state of the tide different, this might have been prevented, but in the then state of the weather and tide it was impossible to prevent it. After the ship struck the ground, some of the crew escaped in a boat, and the captain and the rest of the crew were rescued from the cutter just before she struck the wall.

¹ Only so much of the case is here given as relates to the first count. The citations of counsel are omitted. — ED.

Sir G. Honyman, Q. C. (Biron with him), for the plaintiffs. Upon the first count the defendants are clearly liable. The vessel took the ground through negligence, and all that followed, though then inevitable, was as much the consequence of negligence as the injury done by a runaway horse would be if it was owing to the carelessness of his driver that he was allowed to get beyond control in the first instance.

Pollock, Q. C. (Dixon with him), for the defendants. As to the first point, it cannot be properly said that the defendants' negligence was the proximate cause of the injury. There intervened between their act of negligence and the alleged consequence a series of natural causes over which they had no control, and which could not be calculated on, such as the shifting of the wind, its violence, and the force of the tide as dependent upon it.

Sir G. Honyman, Q. C., in reply. As to the negligence, the whole was one continuous train of causation. *Cur. adv. vult.*

The judgment of the Court (Kelly, C. B., Martin, and Pigott, BB.) was delivered by

KELLY, C. B. The question in this case is whether the injury to the plaintiffs' wall was so caused by the negligence of the defendants as to make the defendants liable within the rule of law applicable to such cases.

The defendants' vessel, by the negligence of the captain and crew, grounded upon a shoal or sand-bank within three quarters of a mile of the wall of the plaintiffs', the immediate effect of which was that the vessel became unmanageable and beyond the control of the crew; and as at the time a high wind was blowing and the tide flowing towards the shore, the vessel was driven and carried with great violence against the wall, and so effected the injury in question.

The rule of law is, that negligence to render the defendants liable must be the *causa causans* or the proximate cause of the injury, and not merely a *causa sine qua non*.

I think that it was so in the present case. The immediate effect of the negligence was to put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the wind and tide were giving at the moment to the sea, and this was directly upon and towards the plaintiffs' wall. The case, therefore, appears to me to be the same as if the ship had been lying at anchor, with the tide flowing rapidly towards a rock, and the defendants had, by some negligence, broken the chain and set free the ship, in consequence of which it had at once and immediately been carried by the tide with great force and violence against the rock, and had become a wreck. Would not the wreck of the ship have been caused by the negligence which broke the chain? I think that it would, and that such a case and the case before the Court are the same; that the negligence of the crew, the servants of the defendants, was thus the immediate cause of

the ship being driven against the wall of the plaintiffs, and that the plaintiffs are therefore entitled to recover. My brother Pigott concurs in this judgment, and my Brother Martin, though entertaining some doubt upon the case, does not dissent.

Judgment for the plaintiffs.

Affirmed in Exchequer Chamber, 1872, L. R. 7 Exch. 247.

MCDONALD v. SNELLING.

1867. 14 Allen, 290.¹

TORT. The declaration was as follows:—

“ And the plaintiff says that he was possessed and the owner of a certain sleigh and a certain horse which was harnessed to said sleigh, and the plaintiff was sitting and riding in said sleigh so harnessed, in a certain highway called Eliot Street, in said Boston, into and across Tremont Street; and one Thomas Baker on the same day was possessed of a certain sleigh, and also of a certain horse drawing the same through and along said Tremont Street towards and near said Eliot Street in said Boston. And whereas then on the same day the defendant was possessed of a certain sled or sleigh, and also of certain horses drawing the same through and along said Tremont Street, and the said defendant then and there, by a certain servant of him the said defendant, had the care, government and direction of the said sled or sleigh of the said defendant and defendant's said horses, yet the said defendant, not minding or regarding his duty in this behalf, then and there by his said servant so negligently and unskilfully managed and behaved himself in this behalf, and so ignorantly, carelessly and negligently drove and managed, guided and governed his said sled or sleigh and horses, that the said sleigh or sled of the said defendant, for want of good and sufficient care and management thereof, and of the horses then and there drawing the same as aforesaid, then and there struck against the said sleigh of the said Baker with such force and violence that the sleigh of the said Baker, wherein he was then sitting and riding as aforesaid, was broken to pieces, by means whereof the said horse of the said Baker was put to fright and ran with great violence, threw out said Baker, and escaping from him ran through and along said Tremont Street to said Eliot Street and into said Eliot Street, and upon, against and over the plaintiff, his said sleigh and horse, with such force and violence that the plaintiff's said sleigh wherein he was then and there sitting and riding as aforesaid was thereby broken to pieces and destroyed, and the plaintiff thrown with great violence from and out of his said sleigh, and his collar-bone

¹ Portions of this opinion are omitted; also the citations of counsel. — Ed.

broken, and otherwise greatly injured and bruised, and his life endangered, and the plaintiff's said horse was greatly damaged and spoiled. And the plaintiff used due care, and said Baker, his agents and servants, used due care, but said defendant, his agents and servants, did not use due care."

The defendant demurred to this declaration, assigning as causes of demurrer that there is no averment in the declaration that the injury to the plaintiff occurred by reason of or by means of the negligence of the defendant; and that it does not appear from the averments of the declaration that the alleged negligence of the defendant was the proximate cause of the injury to the plaintiff, sufficient in law to render the defendant liable in damages.

This demurrer was overruled in the superior court, and judgment ordered for the plaintiff; and the defendant appealed to this Court.

J. L. Stackpole, for defendant.

J. Nickerson, for plaintiff.

FOSTER, J. The question raised by this demurrer is, whether the injury received by the plaintiff was so remote from the negligent act of the defendant that the action cannot be sustained, although the plaintiff was injured without his own fault, and would not have been injured but for the fault of the defendant. How far at common law is one guilty of negligence responsible in damages for the consequences resulting from his neglect?

If the present action had been brought against a town, under circumstances similar to those disclosed in this declaration, *Marble v. Worcester*, 4 Gray, 395, would be a decisive authority in favor of the defendant. The liability for damages caused by defects in highways is limited to cases where the defect is the direct and immediate cause of the injury. *Jenks v. Wilbraham*, 11 Gray, 142. But this statute liability is more narrowly restricted than the rule in actions at common law for damages caused by negligence, in which it is perfectly well settled that the contributory negligence of a third party is no defence, where the defendant has also been guilty of negligence without which the damage would not have been sustained. *Eaton v. Boston & Lowell Railroad*, 11 Allen, 500. The extent of the defendant's responsibility cannot therefore be conclusively determined by the rule of *Marble v. Worcester*, because the limits of liability under the statute as to defects in public ways and at common law for negligence are not identical. These cases against towns can be reconciled with the general principles of the law only by the consideration that they depend exclusively on a statute provision, within the terms of which they are strictly confined.

Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person in-

jured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well established and ancient doctrine of the common law, and such a liability extends to consequential injuries, by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. | The damage is not too remote if according to the usual experience of mankind the result was to be expected. | This is not an impracticable or unlimited sphere of accountability, extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and, secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of.

It is clear from numerous authorities that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues.

There can be no doubt that the negligent management of horses in the public street of a city is so far a culpable act that any party injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare owes the duty of due care to the community, or to all persons whom his negligence may expose to injury. Nor is it open to question that the master in such a case is responsible for the misconduct of his servant.

Applying these principles more closely to the facts set forth in this declaration and admitted by the demurrer, we find that by careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver and to run violently along Tremont Street round a corner, near by, into Eliot Street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with a whip and so made it run

away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons travelling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act. We are not therefore dealing with remote or unexpected consequences, not easily foreseen nor ordinarily likely to occur, and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom.

These views are fortified by numerous decisions, to a few of which it may be expedient to refer. It was recently held by this court that when a horse was turned loose on the highway, and there kicked a colt running by the side of its dam, the owner of the horse was liable for that damage. *Barnes v. Chapin*, 4 Allen, 444. We cannot distinguish between the different ways of letting a horse loose upon the street; whether by leaving him there untied, or leaving a gate open, or, as in the present case, by driving against him, and thus causing him to run away. In *Powell v. Deveney*, 3 Cush. 300, the defendant's servant left a truck standing beside a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the same street, after which a third truckman tried to drive his truck between the two others. In attempting to do so with due care, he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk so that they struck the plaintiff who was walking by, and broke her leg. For this injury she was allowed to maintain her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant on the street, which was treated as the sole cause of the breaking of the plaintiff's leg, and in legal contemplation sufficiently proximate to render the defendant responsible. See also *Powell v. Salisbury*, 2 Yo. & Jer. 391; *Vandenburg v. Truax*, 4 Denio, 464; *Rigby v. Hewitt*, 5 Exch. 240; *Greenland v. Chaplin*, *Ib.* 245; *Morrison v. Davis*, 20 Penn. State R. 175; *Lynch v. Nurdin*, 1 Q. B. 29; *Thomas v. Winchester*, *ubi supra*, and cases there cited. When a horse strayed on the highway and there viciously and violently kicked a child, the owner was held not liable in the absence of evidence that he knew the animal was in the habit of kicking; because the act was not one which it was in the ordinary course of nature for a horse of common temper and disposition to do. *Cox v. Burbidge*, 32 Law Journ. (N. S.) C. P. 89. See also *Cooke v. Waring*, *Ib.* Exch. 262. But two years later the same court held a defendant liable who had negligently left insecure a gate which he was bound to repair, in consequence of which his horse strayed into the field of an adjoining proprietor and there kicked another horse; because this was the natural consequence of two horses meeting under

such circumstances, and such an injury produced by such an animal was deemed to be the proximate consequence of the defendant's negligence. *Lee v. Riley*, 34 Law Journ. (N. S.) C. P. 212. See also *Reed v. Edwards*, Ib. C. P. 31. In a case where the defendant left on the street exposed for sale a machine for crushing oil-cake between rollers, into the cogs of which a little child put his fingers while another boy turned the handle, and the fingers were crushed, the Court held that the act was too remote; and Bramwell, B., said: "The defendant was no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them;" but the same Baron added, "Further I can see no evidence of negligence in him. If his act in exposing this machine was negligence, will his act in exposing it again be called wilfully mischievous? If that could not be said, then it is not negligence, for between negligence and wilful mischief there is no difference but of degree." *Mangan v. Atterton*, Law Rep. 1 Exch. 239. This case has no tendency and indicates no intention to overrule *Dixon v. Bell*, 5 M. & S. 198, in which, an injury having been received from a loaded gun, Lord Ellenborough held the owner liable for leaving a dangerous instrument in a state capable of doing mischief, although the mischief was caused by a girl taking it up, pointing it at a child, and snapping the trigger after the priming had been withdrawn.

It may not always be easy to determine whether any particular act of negligence is of such a character as to render the party guilty of it liable to third persons; or whether the ensuing consequences are so far natural and probable as to impose a liability for them in damages. Cases may be put falling very near the dividing line, and no rule can be laid down in advance which will determine all with precision. But the difficulty of applying a principle is a poor argument against its validity, unless one more satisfactory can be proposed in its stead. There may be discrepancies and want of uniformity in the application of the principle to the facts of particular cases, but all the authorities cited concur in the support of the doctrine we have stated, and agree as to the rule by which the extent of liability for consequential damages resulting from negligence ought to be determined.

In the opinion of a majority of the Court, the demurrer in the present case must be overruled, because on the statements of the declaration the plaintiff's injury does not appear to be so remote from the negligence of the defendant as to exonerate the latter from liability. When such a question is raised by the pleadings or arises upon agreed or undisputed facts, it is matter of law; but where the evidence is contradictory, or the inferences to be drawn from it are uncertain, the jury must determine by a verdict whether the facts fall within the rule of law to be laid down on the subject. *Wilson v. Newport Dock Co.*, *ubi supra*.

Demurrer overruled.

SCOTT v. SHEPHERD.

13 Geo. III. 2 Wm. Blackstone, 892.

TRESPASS and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes that he lost sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last summer assizes at Bridgwater, when the jury found a verdict for the plaintiff with £100 damages, subject to the opinion of the Court on this case. On the evening of the fair day at Milbourne Port, 28th October, 1770, the defendant threw a lighted squib, made of gunpowder, &c., from the street into the market-house, which is a covered building supported by arches, and inclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and threw it across the said market-house where it fell upon another standing there of one Ryal, who sold the same sort of wares; who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and in so throwing it struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter then bursting put out one of the plaintiff's eyes. *Qu.* If this action be maintainable?

This case was argued last term by Glyn for the plaintiff, and Burland for the defendant; and this term, the court being divided in their judgment, delivered their opinions *seriatim*.

NARES, J., was of opinion that trespass would lie well in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has, by statute W. III., been since made a nuisance. Being, therefore, unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate: 11 Hen. VII., 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 596; Hob. 134; T. Jones, 205; 6 Edw. IV., 7, 8; Fitzh. Trespass, 110. The principle I go upon is what is laid down in *Reynolds v. Clarke*, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So in 12 Hen. IV., trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. VIII. 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60; Reg. 108, 95; 6

Edw. IV., 7, 8; 1 Ld. Raym. 272; Hob. 180; Cro. Jac. 122, 43; F. N. B. 202, 91 g. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient. *Qui facit per aliud facit per se*. He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the *King v. Huggins*, 2 Lord Raym. 1574; *Parkhurst v. Foster*, 1 Lord Raym. 480; *Rosewell v. Prior*, 12 Mod. 639. And it was declared by this court, in *Slater v. Baker*, M. 8 Geo. III., 2 Wils. 359, that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case; but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

BLACKSTONE, J., was of opinion that an action of trespass did not lie for Scott against Shepherd, upon this case. He took the settled distinction to be, that where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case: *Reynolds v. Clarke*, Lord Raym. 1401, Stra. 634; *Haward v. Bankes*, Burr. 1114; *Harker v. Birbeck*, Burr. 1159. The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain, but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the court in the same case, that if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over it, and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass, because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbor's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. IV., 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case; per Powell, J., 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that lawful or unlawful is quite out of the case; the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on

the other. And trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was immediate or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal or Scott. The tortious act was complete when the squib lay at rest upon Yates's stall. He, or any by-stander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it by either Willis or Ryal, who both were agents, and acted upon their own judgment. This differs it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *vis impressa*, is continued, though diverted. Here the instrument of mischief was at rest, till a new impetus and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act; nay, it may be extended *in infinitum*. If a man tosses a football into the street, and, after being kicked about by one hundred people, it at last breaks a tradesman's window, shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether case would lie against Shepherd for the consequential damage; though, as at present advised, I think, upon the circumstances, it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing it out of the open sides into the street (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person, — nothing but inevitable necessity: *Weaver v. Ward*, Hob. 134; *Dickenson v. Watson*, T. Jones, 205; *Gilbert v. Stone*, Al. 35, Styl. 72. So in the case put by Bryan, J., and assented to by Littleton and Cheke, C. J.,

and relied on in Raym. 467, "If a man assaults me, so that I cannot avoid him, and if I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavoring to defend myself." But none of these great lawyers ever thought that trespass would lie, by the person struck, against him who first assaulted the striker. The cases cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendant's immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act. But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis is neither the act of Shepherd, nor the inevitable effect of it; much less the subsequent throwing by Ryal. *Slater v. Barker* was first a motion for a new trial after verdict. In our case the verdict is suspended until the determination of the Court. And although after verdict the Court will not look with eagle's eyes to spy out a variance, yet when a question is put by the jury upon such a variance, and it is made the very point of the cause, the Court will not wink against the light, and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought, and the Court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain trespass may also frequently maintain case, but not *e converso*. Every action of a trespass with a "*per quod*" includes an action on the case. I may bring trespass for the immediate injury and subjoin a "*per quod*" for the consequential damages; or may bring case for the consequential damages, and pass over the immediate injury, as in the case from 11 Mod. 180, before cited. But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant: Gates and Bailey, Tr. Geo. III., 2 Wils. 313. It is said by Lord Raymond, and very justly, in *Reynolds v. Clarke*, "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I therefore think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained), I am of opinion that in this action judgment ought to be for the defendant.

GOULD, J., was of the same opinion with Nares, J., that this action was well maintainable. The whole difficulty lies in the form of the action, and not in the substance of the remedy. The line is very nice between case and trespass upon these occasions. I am persuaded there are many instances wherein both or either will lie. I agree with Brother Nares, that wherever a man does an unlawful act, he is an-

swerable for all the consequences ; and trespass will lie against him, if the consequence be in nature of trespass. But exclusive of this, I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What Willis and Ryal did was by necessity, and the defendant imposed that necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers : 1, from the general mischievous intent ; 2, from the obvious and natural consequences of such an act ; which reasoning will equally apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land : Hardr. 69 ; *Courtney v. Collet*, 1 Lord Raym. 272. I shall not go over again the ground which Brother Nares has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

DE GREY, C. J. This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my Brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act ; for actions of trespass will lie for legal acts when they become trespassers by accident ; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c. They may also not lie for the consequences even of illegal acts, as that of casting a log into the highway, &c. But the true question is, whether the injury is the direct and immediate act of the defendant ; and I am of opinion that in this case it is. The throwing the squib was an act unlawful, and tending to affright the bystander. So far mischief was originally intended ; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it, — *Egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows ; if done with a deliberate intent, the consequence may amount to murder ; if incautiously, to manslaughter : Fost.

261. So, too, in 1 Ventr. 295, a person breaking a horse in Lincoln's Inn Fields hurt a man ; held, that trespass lay ; and 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequently to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable ; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95, a, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act needs not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference, but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares, that the present action is maintainable.

Posted to the plaintiff.

JONES v. BOYCE.

1816. 1 Starkie, 493.

THIS was an action on the case against the defendant, a coach proprietor, for so negligently conducting the coach, that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken.

It appeared that soon after the coach had set off from an inn, the coupling rein broke, and one of the leaders being ungovernable, whilst the coach was on a descent, the coachman drew the coach to one side of the road, where it came in contact with some piles, one of which it broke, and afterwards the wheel was stopped by a post. Evidence was adduced to show that the coupling rein was defective, and that the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road in order to stop the career of the horses. Some of the witnesses stated that the wheel was forced against the post with great violence ; and one of the witnesses stated, that at that time the plaintiff, who had before been seated on the back part of the coach, was jerked forwards in consequence of the concussion, and that one of the wheels was elevated to the height of eighteen or twenty inches ; but whether the plaintiff jumped off, or was jerked off, he could not say. A witness also said, "I should have jumped down had I been in his (the plaintiff's) place, as the best means of avoiding the danger." The coach was not overturned, but the plaintiff was immediately afterwards seen lying on the road with his leg broken, the bone having been protruded through the boot.

Upon this evidence, Lord Ellenborough was of opinion, that there was a case to go to the jury, and a considerable mass of evidence was then adduced, tending to show that there was no necessity for the plaintiff to jump off.

LORD ELLENBOROUGH in his address to the jury, said: This case presents two questions for your consideration; first, whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance, and if you should be of that opinion, the second question for your consideration will be, whether that default was conducive to the injury which the plaintiff has sustained; for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the plaintiff, as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action is not maintainable. To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation.—His Lordship, after recapitulating the facts, and commenting upon them, and particularly on the circumstance of the rein being defective, added: If the defect in the rein was not the constituent cause of the injury, the plaintiff will not be entitled to your verdict. Therefore it is for your consideration, whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences; if, therefore, you should be of opinion, that the reins were defective, did this circumstance create a necessity for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril. If you are of that opinion, then, since the original fault was in the proprietor, he is liable to the plaintiff for the injury which his misconduct has occasioned. This is the first case of the kind which I recollect to have occurred. A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger; it must appear that there existed a reasonable cause for alarm.

The jury found a verdict for the plaintiff.

Garrow, A.-G., and V. Lawes for the plaintiff.

Topping, Scarlett, and Espinasse for the defendant.

WOOLLEY v. SCOVELL.

9 Geo. IV. 3 *Manning & Ryland*, 105.

CASE for negligence in throwing a bag of wool from a lofty warehouse into a yard, whereby the wool fell upon the plaintiff, who was in the yard, and injured him. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the sittings at Guildhall after last term,¹ the following facts appeared: The defendant was the occupier of a warehouse the windows of which opened into a yard. Having occasion to remove a bag of wool from an upper floor of the warehouse, the defendant, for the purpose of saving time and expense, directed his servants to throw the wool out of the window of the warehouse. Before the bag was dropped from the window, one of the defendant's servants called out to warn passengers. The plaintiff, who happened to be in the yard, looked up and saw the wool as it was thrust out of the window; he then ran across the yard, thinking, as he afterwards said, that he should have time to escape. The wool, however, fell upon him, and he sustained a considerable injury. The learned Judge told the jury, that if they were of opinion that the plaintiff ran wantonly or carelessly into danger, they ought to find a verdict for the defendant; but that if they thought the plaintiff had lost his presence of mind by the act of the defendant, and in the confusion produced by the situation in which he found himself, had run into the danger, they ought to give their verdict for the plaintiff. The jury found a verdict for the plaintiff, damages £150.

Sir *J. Scarlett* now moved to set aside the verdict, on the ground of misdirection. The rule laid down by the learned Judge was very humane, but it is submitted that it was not founded in law. The law should not vary according to the nerves of parties. It is true that with respect to ships, the loss must be borne by the party who was first in the wrong; but there the other party has not the entire control over the motions of his vessel, which depend upon the winds and waves. [Bayley, J. You complain of that part of the direction in which the jury were told, that if the plaintiff was deprived of his presence of mind by the wrongful act of the defendant, he was entitled to their verdict; not that the facts of the case did not warrant such an inference.]

LORD TENTERDEN, C. J. The first fault was the throwing of the wool from the window instead of lowering it by the usual mode, by a crane. This, the defendant admitted, he did to save time.

BAYLEY, J. I think the direction was right. Whether the plaintiff was deprived of his presence of mind by the act of the defendant, was a question for the jury.

LITLEDALE, J. I have no doubt whatever that the direction was right. It is not surprising that the plaintiff should have been alarmed, and should thereby have lost his self-possession; and this alarm was occasioned by the wrongful act of the defendant.

Rule refused.

DENNY v. NEW YORK CENTRAL RAILROAD
COMPANY.

1859. 13 Gray, 481.¹

ACTION OF TORT for damages to wool of the plaintiff, delivered by him to the defendants as common carriers of merchandise, to be transported from the Suspension Bridge at Niagara Falls to Albany. Trial before Metcalf, J.

It appeared that the wool described in the declaration was received by the defendants at Suspension Bridge, directed to Boston, on the 27th of January, 1857, and that it arrived at Albany on the 6th of February following; and, being there in the defendants' freight depot, was submerged by a sudden and violent flood in Hudson River, which caused the alleged injury to the wool. It appeared in evidence, that the time required for transporting merchandise, in the usual course of business, from Suspension Bridge to Albany, was forty-eight hours.

The jury found specially that the defendants were wanting in that degree of care and diligence which the law required of them in seasonably transporting the wool from Suspension Bridge to Albany; but that the defendants were not wanting in that degree of care which the law required of them in depositing the wool in a proper place, when it arrived in Albany. Verdict for plaintiff.

G. F. Hoar, for defendants.

F. H. Dewey, for plaintiff.

MERRICK, J., . . . It is therefore now to be determined by the Court, whether the defendants are, by reason and in consequence of their negligence in the prompt and seasonable transportation of the wool, responsible for the injury which it sustained after it was safely deposited in their depot at Albany. And we think it is very plain that, upon the well settled principles of law applicable to the subject, they are not.

It is said to be an ancient and universal rule resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions. 2 Parsons on Con. 456. The rule is not limited to cases in which

¹ The statement of facts has been abridged. The citations of counsel and portions of the opinion are omitted. — Ed.

special damages arise; but is applicable to every case in which damage results from a contract violated or an injurious act committed. 2 Greenl. Ev. § 256; 2 Parsons on Con. 457. And the liabilities of common carriers, like persons in other occupations and pursuits, are regulated and governed by it. Story on Bailments, 586; Angell on Carriers, 201; *Morrison v. Davis*, 20 Penn. State R. 171.

In the last named case, it is said that there is nothing in the policy of the law relating to common carriers that calls for any different rule, as to consequential damages, to be applied to them. In that case may be found not only a clear and satisfactory statement of the law upon the subject, but a significant illustration of the rule which the decision recognizes and affirms. It was an action against the defendants, as common carriers upon the Pennsylvania Canal. It appeared that their canal boat, in which the plaintiff's goods were carried, was wrecked below Piper's Dam, by reason of an extraordinary flood; that the boat started on its voyage with a lame horse, and by reason thereof great delay was occasioned in the transportation of the goods; and that, had it not been for this, the boat would have passed the point where the accident occurred, before the flood came, and would have arrived in time and safety at its destination. The plaintiff insisted that, inasmuch as the negligence of the defendants in using a lame horse for the voyage occasioned the loss, they were therefore liable for it. But the Court, assuming that the flood was the proximate cause of the disaster, held, that the lameness of the horse, by reason of which the boat, in consequence of his inability thereby to carry it forward with the usual and ordinary speed, was exposed to the influence and dangers of the flood, was too remote to make the defendants responsible for the goods which were lost in the wreck. It was only, in connection with other incidents, a cause of the final, direct, and proximate cause by which the damages sought to be recovered were immediately occasioned.

There is so great a resemblance between the circumstances upon which the determination in that case was made, and those upon which the question under consideration in this arises, that the decision in both ought to be the same. In this case, the defendants failed to exercise due care and diligence, in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual, ordinary, and reasonable speed. The consequence of this failure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible. But in all that occurred afterwards there was no failure in the performance of their duty. There was no delay and no negligence in any part of the transportation between Syracuse and Albany, and upon reaching the latter place the wool was safely and properly stored in their freight depot. It was their duty to make this disposition of it. They had then reached the terminus of their road; the carriage of the goods was then complete; and the

duty only remained of making delivery. The deposit of the wool in the depot was the only delivery which they were required to make; and having made that, their liabilities as carriers thenceforward ceased. It was there to be received by the owner, or taken up by the proprietors of the railroad next in course of the route to Boston. *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263; *Nutting v. Connecticut River Railroad*, 1 Gray, 502. The rise of waters in the Hudson, which did the mischief to the wool, occurred at a period subsequent to this, and consequently was the direct and proximate cause to which that mischief is to be attributed. The negligence of the defendants was remote; it had ceased to operate as an active, efficient, and prevailing cause as soon as the wool had been carried on beyond Syracuse, and cannot therefore subject them to responsibility for an injury to the plaintiff's property, resulting from a subsequent inevitable accident which was the proximate cause by which it was produced. It is to the latter only to which the loss sustained by him is attributable.

It follows from these considerations, that the verdict in the plaintiff's behalf must be set aside, and a new trial be had; in which he will recover such damages as he proves were the direct consequence of the negligence of which the defendants may be shown to have been guilty.

New trial ordered.

✓GILMAN v. NOYES.

1876. 57 *New Hampshire*, 627.¹

FROM COÖS Circuit Court.

Action on the case, for carelessly leaving the plaintiff's bars down, whereby his cattle and sheep escaped, and he was compelled to expend, and did expend, time and money in hunting for the same, and his sheep were wholly lost.

The evidence tended to show that the defendant, in looking after his own cattle, left the plaintiff's bars down, and that certain sheep which the plaintiff was pasturing were wholly lost. The evidence tended to show that the sheep were destroyed by bears after they had escaped from the plaintiff's pasture. The defendant claimed that the damages were too remote, and that they were not the natural consequences of the alleged careless acts of the defendant.

The defendant requested an instruction; that if the jury find that the sheep were killed by bears after their escape from the pasture, the plaintiff cannot recover, as the damages would be too remote.

¹ The statement of facts has been abridged. Only as much of the case is given as relates to the question of legal cause. — ED.

This request the Court denied; but did instruct the jury, among other things, that if the defendant left the plaintiff's bars down, and the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for the act of the defendant, he was liable for their value.

Verdict for plaintiff. Motion for new trial.

Dudley, and Ray & Drew, for plaintiff.

Aldrich & Shurtleff, and Bingham, for defendant.

CUSHING, C. J. — [after deciding other questions]. It should have been left to the jury to determine whether the injury was one for which the defendant's fault was the proximate cause. The Court rightly refused to instruct the jury that the damage was too remote, because that was a matter for the jury to determine. I am not prepared, however, to hold, that the criterion, for determining whether the defendant's fault was the proximate cause of the damage, is, whether the damage would or would not have happened without the defendant's fault.

This matter of remote and proximate cause has been recently a good deal discussed in the case of fires occasioned by the negligent management of locomotives. Where the fire has spread from point to point and from building to building, the question to what extent the negligence was the proximate cause has been held to be for the jury to determine. But in no one of those cases, whether the damage was held to be proximate or remote, could it have happened at all except for the negligence complained of.

I think the doctrine of the cases now is, that the question whether the damage is remote or proximate is a question of fact for the jury, and that the jury have to determine whether the damage is the natural consequence of the negligence, and such as might have been anticipated by the exercise of reasonable prudence. If the damage would not have happened without the intervention of some new cause, the operation of which could not have been reasonably anticipated, it would then be too remote. 2 Parsons on Contracts, 179; *State v. Manchester & Lawrence Railroad*, 52 N. H. 552, and cases there cited; *Fent v. Toledo, Peoria & Warsaw Railway Co.*, 59 Ill. 349 — s. c. 14 Am. R. 13.

In the present case it appears that the evidence tended to show the intervention of such new cause,—viz., bears,—and it would have been for the jury to say whether it was natural and reasonable to expect that if the sheep were suffered to escape they would be destroyed in that way.

If these views are correct, the verdict must be set aside, and a new trial granted.

SMITH, J. I concur in the foregoing conclusions of the chief-justice, and for the reasons given by him. The principal question in this case has been much discussed in the English and American courts, though but little in this State. The rule, that the plaintiff can recover only

when the defendant's act or negligence was the proximate cause of the injury, is one of universal application; but the difficulty lies in determining when the cause is proximate and when remote. It is a mixed question of law and of fact, to be submitted to the jury under proper instructions. We have recently held that it is always for the jury to say whether the damage sustained is what the defendant ought to have expected, in the exercise of reasonable care and discretion. *Stark v. Lancaster*, 57 N. H. 88, and authorities cited; *McIntyre v. Plaisted*, 57 N. H. 606; — see, also, *State v. M. & L. R. R.*, 52 N. H. 552; *Cate v. Cate*, 50 N. H. 144; *Underhill v. Manchester*, 45 N. H. 218.

The rule, as thus laid down, is also given in substance in 2 *Parsons on Contracts*, 456, 2 Gr. Ev., sec. 256, and *Sedgwick on Damages*, 88. The numerous cases in which this question has been discussed are cited by the above authors. It would be an unnecessary labor to review them in detail.

In this case the evidence tended to show the intervention of a new cause of the destruction of the plaintiff's sheep after their escape from his pasture, which could not reasonably have been anticipated. The only practicable rule to be drawn from all the cases, for determining this case, it seems to me, is, to inquire whether the loss of the plaintiff's sheep by bears was an event which might reasonably have been anticipated from the defendant's act in leaving his bars down, under all the circumstances of this case. If it was a natural consequence which any reasonable person could have anticipated, then the defendant's act was the proximate cause. If, on the other hand, the bears were a new agency, which could not reasonably have been anticipated, the loss of the sheep must be set down as a remote consequence, for which the defendant is not responsible.

The jury were instructed that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for this act of the defendant, he was liable. Under these instructions the jury could not inquire whether the destruction of the sheep by the bears was an event which might reasonably have been anticipated from the leaving of the bars down, and for this reason I agree that the verdict must be set aside.

LADD, J. I am unable to free my mind from considerable doubt as to the correctness of the ground upon which my brethren put the decision of this case.

The defendant requested the Court to charge that, if the jury found that the sheep were killed by bears after their escape, the damages would be too remote. This the Court declined to do, but did instruct them that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for that act of the defendant, he was liable for their value. Both the request and the instruction went upon the ground that the question of remoteness — all the facts being found — was for the Court, and not for the jury. Upon that distinct and simple question the defendant claimed

one way and the Court held the other. I understand it to be the opinion of my brethren that neither was right; that the question of remoteness was for the jury, and that the Court erred in not so treating it. Whether it is for the jury or the Court, every one who has considered the matter will agree that it is almost always a troublesome question, and often one attended with profound intrinsic difficulty.

The verdict here settles (1) that the bars were left down by the defendant; (2) that the sheep escaped in consequence thereof; (3) that they would not otherwise have been killed. Was the defendant's act the proximate cause of the damage? Was it the cause in such sense that the law will take cognizance of it by holding the defendant liable to make reparation in damages? And is that question one for the Court, or for the jury, to decide? The sheep would not have been killed, the jury say, but for that act: does it follow that the damage was not too remote? Certainly, I think, it does not. That one event would not have happened but for the happening of some other, anterior in point of time, doubtless goes somewhat in the direction of establishing the relation of cause and effect between the two. But no rule of law as to remoteness can, as it seems to me, be based upon that one circumstance of relation alone, because the same thing may very likely be true with respect to many other antecedent events at the same time. The human powers are not sufficient to trace any event to all its causes, or to say that anything which happens would [not] have happened just as it did but for the happening of myriads of other things more or less remote and apparently independent. The maxim of the schoolmen — *Causa causantis, causa est causati* — may be true, but it obviously leads into a labyrinth of refined and bewildering speculation whither the law cannot attempt to follow. This case furnishes an illustration. The jury say the sheep would not have been killed by bears but for their escape, and would not have escaped but for the bars being left down. But it is equally certain, without any finding of the jury, that they would not have been killed by bears if the bears had not been there to do the deed; and how many antecedent facts the presence of the bears may involve, each one of which bore a causative relation to the principal fact sufficiently intimate so that it may be said the latter would not have occurred but for the occurrence of the former, no man can say. Suppose the bears had been chased by a hunter, at any indefinite time before, whereby a direction was given to their wanderings which brought them into the neighborhood at this particular time; suppose they were repulsed the night before in an attack upon the bee-hives of some farmer in a distant settlement, and, to escape the stings of their vindictive pursuers, fled, with nothing but chance to direct their course, towards the spot where they met the sheep; suppose they were frightened that morning from their repast in a neighboring cornfield, and so brought to the place of the fatal encounter just at that particular point of time.

Obviously, the number of events in the history not only of those individual bears, but of their progenitors clear back to the pair that, in instinctive obedience to the divine command, went in unto Noah in the ark, of which it may be said, but for this the sheep would not have been killed, is simply without limit. So the conduct of the sheep, both before and after their escape, opens a field for speculation equally profound and equally fruitless. It is easy to imagine a vast variety of circumstances, without which they would not have made their escape just at the time they did though the bars were down, or, having escaped, would not have taken the direction to bring them into the way of the bears just in season to be destroyed, as they were. Such a sea of speculation has neither shores nor bottom, and no such test can be adopted in drawing the uncertain line between consequences that are actionable and those which are not.

Some aid in dealing with this question of remoteness in particular cases is furnished by Lord Bacon's rule, *In jure causa proxima, non remota spectatur*, and other formulas of a like description, because they suggest some boundaries, though indistinct, to a wilderness that otherwise, and perhaps in the nature of things, has no limit.

Where damages are claimed for the breach of a contract, it has been said that the nearest application of anything like a fixed rule is, that the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Cockburn, C. J., in *Hobbs v. London & S. W. Railway Co.*, L. R. 10 Q. B. 117. In tort, they must be the legal and natural consequence of the wrongful act. Sedgwick on Damages, 82, and cases cited; 2 Gr. Ev., secs. 252-256, and cases cited. But an examination of the numerous cases where this matter has been carefully and learnedly discussed, shows that the intrinsic difficulties of the subject are not removed, although they may be aided, by the application of such rules. Whether the extent, degree, and intimacy of causation are sufficient to bring the injurious consequences of an act within the circle of those wrongs for which the law supplies a remedy, still remains the great question to be determined in each case upon its individual facts. That the subject is one beset with difficulties is conspicuously shown by the great number of cases, from *Scott v. Shepherd*, 2 Wm. Bl. 892 (where Sir William Blackstone was unable to agree with the Court), down to the present time, in which judges of equal learning and ability have differed as to the application of rules by which all admit they are to be governed.

The recent case of *Brand v. Hammersmith & City Railway Co.*, L. R. 1 Q. B. 130, well illustrates this remark, although the construction of a statute was there involved. It was held by the Court of Queen's Bench (Mellor and Lush, JJ., delivering opinions), that the owner of a house, none of whose lands have been taken for the purposes of a railway, cannot, under certain statutes, recover compensation in respect of injury to the house, — depreciating its value, —

caused by vibration, smoke, and noise in running locomotives with trains in the ordinary manner after the construction of the railway. Upon error to the Exchequer Chamber this decision of the Queen's Bench was reversed by Bramwell, B., Keating, and Montague Smith, JJ., Channell, B., dissenting. Sir William Erle, while chief-justice of the Common Pleas, had also prepared an opinion sustaining the judgment of the Queen's Bench, which was not delivered because the formal judgment of the Court was delayed till after his resignation. L. R. 2 Q. B. 223, note p. 246.

The cause was then carried, upon error, to the House of Lords, and the judges were called in. Of the judges who returned answers, five were in favor of affirming the judgment of the Exchequer Chamber, viz., Willes, Keating, and Lush, JJ., and Bramwell and Piggott, BB.; while Mr. Justice Blackburn delivered a strong opinion the other way. In the House of Lords, Lord Chelmsford and Lord Colonsay were for reversing the judgment of the Exchequer Chamber, while the Lord Chancellor was for affirming it. So that, of all the judges and law lords who examined the question (including Sir William Erle), six were of the opinion that the damages could not be recovered, and seven of a contrary opinion; while Lush, J., changed his mind between the hearing in the Queen's Bench and that before the House of Lords, and delivered an opinion the other way. The case was finally decided against the opinions of a majority of the judges who considered it.

The question is, whether Courts can relieve themselves from troublesome inquiries of this description by handing them over to the jury for determination. I am not now prepared to admit that they can. In this case, as we have seen, the verdict settles that the defendant left the bars down, that the sheep escaped in consequence, and that they would not have been killed but for their escape. Clearly, no disputed fact is left unsettled. The only question left open is, whether the damage is within or without the line drawn by the law as the boundary between those injuries for which the law compels compensation to be made and those for which it does not. It is the law that furnishes remedies. Whether any act or default amounts to a legal wrong and injury for which compensation may be recovered depends upon the law, and is to be determined by an application of rules either furnished by the legislature in the form of statutes, or found existing in the common law. If the law takes no cognizance of an act, furnishes no remedy for its injurious results, then there is no remedy; and though it may be wrong in a sentimental or moral point of view, the sufferer can have no recompense. And I cannot see what difference it makes in this respect whether the rule is established by a statute, or comes from the common law. That A. can recover damages against B. for an assault and battery committed upon him by the latter, depends just as much upon a rule of positive law, in this State, as that he may recover against C., who has unlawfully furnished liquor to B., who, in a

state of intoxication produced by the liquor, makes the assault. One is a provision of the common law; the other, of a statute. When the Court of South Carolina held that where a person, against the law, furnished a slave with intoxicating liquor, by which he became drunk and lay out all night, and died in consequence, the owner of the slave could recover his value against the person who furnished the liquor (*Berkley v. Harrison*, cited in Sedgw. on Dam. 89), they were declaring and applying a rule of law as much as though that remedy had been given by a statute similar to ours. So it is in the great mass of cases with which the books are filled: the question as to remoteness is determined by the Court, and the rule administered as a rule of law. See cases cited in Sedgw. on Dam., ch. iii., *passim*. A large number of English and American cases might be added, were any citation of authorities necessary.

In *Hobbs v. The London & S. W. Railway Co.*, already referred to, the plaintiff, with his wife and two children, took tickets on the defendants' railway from Wimbledon to Hampton Court, by the midnight train. They got into the train, but it did not go to Hampton Court, but went along the other branch to Esher, where the party were compelled to get out. It being so late at night, the plaintiff was unable to get a conveyance, or accommodation at an inn; and the party walked to the plaintiff's house, a distance of about five miles, where they arrived about three in the morning. It was a drizzling night, and the wife caught cold and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance. The jury gave £28 damages, — viz., £8 for the inconvenience suffered by having to walk home, and £20 for the wife's illness and its consequences. The court held the £20 too remote. Blackburn, J., after stating the rule substantially as given by the chief-justice, says, — "For my own part, I do not feel that I can go further than that. It is a vague rule, and, as Bramwell, B., said, it is something like having to draw a line between night and day: there is a great duration of twilight when it is neither night nor day." And further on: "I do not think it is any one's fault that it cannot be put more definitely. I think it must be left as vague as ever as to where the line must be drawn, — but I think, in each case, the Court must say whether it is on the one side or the other; and I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was to be left generally to the jury to say whether the damage was too remote or not."

Of course, all matters of fact, with respect to the causative relation that exists between the act complained of and the injurious consequences for which damages are sought, must be found by the jury; — and so, in one sense, it may be said that the question of remoteness is for the jury, under proper instructions by the Court; — but my doubt

is, whether proper instructions by the Court should not contain specific direction as to whether any given fact of injury, if found proved, would or would not, with respect to the alleged cause, occupy the position of remoteness beyond the actionable degree.

In the present case, if all the facts found by the jury had been well pleaded in the declaration, and there were a demurrer, would it not be the duty of the Court to say whether the action could be maintained?

There are a few American cases which seem to give countenance to the view upon which this case has been decided by the Court. *Fairbanks v. Kerr*, 70 Pa. St. 86, *Saxton v. Bacon*, 31 Vt. 540, *Fent v. Toledo, Peoria & Warsaw Railway Co.*, 59 Ill. 349, are, perhaps, to be so regarded.

Should it be said that the question, whether a given consequence is one which might fairly be anticipated by one knowing the facts, is in its nature a question of fact, it must at the same time be admitted that it is a fact which lies rather in the region of conjecture than of evidence, and must be determined by an appeal to the experience and knowledge of human nature, and the natural sequence of cause and effect possessed by him who is to decide it, rather than by weighing testimony and balancing proofs, while it is at the same time pure matter of law whether a given act is prohibited, and pure matter of law and construction whether a remedy is given by the law, written or unwritten, for an injury sustained in consequence of such act. But, however the American cases referred to are to be understood, it seems to me the great weight of authority is against the conclusion of the Court; for every case, where the simple question of remoteness has been determined by the Court, and the rule applied as a rule of law, would seem to be a direct authority the other way. Those cases are too numerous and too familiar to need citation.

The charge of the Court was in accordance with this view. The jury were required to find whether the act of the defendant in leaving the bars down was an event without which the loss would not have occurred; and then the Court undertook to apply a rule of law by saying that, if that particular relation of cause and effect did exist, the consequence was so near, so direct, and followed so naturally from the cause, that it must be regarded as a legal consequence for which the defendant should be held to make reparation in damages. I am not prepared to say that this was error.

As the case is disposed of upon different grounds, it is unnecessary to consider whether the holding of the Court upon this question of remoteness was right or not. A few cases may, however, be referred to, which bear more or less directly upon that question, as well as the main question I have been considering. In *Powell v. Salisbury*, 2 Y. & J. 391, the plaintiff declared in case against the defendant, for not repairing his fences, *per quod* the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystack:—held, that the damage was not too remote, and that the action was

maintainable. In *Lee v. Riley*, 18 C. B. (N. S.) 722, the defendant's mare strayed into a field belonging to the plaintiff, through the defect of a fence which the defendant was bound to repair, and kicked the plaintiff's horse:—held, that the defendant was responsible for his mare's trespass, and that the damage was not too remote. In *Lawrence v. Jenkins*, L. R. 8 Q. B. 274, the plaintiff's cows strayed upon the defendant's close through a gap in the division fence, made by the carelessness of the defendant's servants in felling a tree upon it, and there fed on the leaves of a yew tree, and died in consequence:—held, that the damage was not too remote, and that the defendant was liable to the plaintiff for the loss of the cows. In *Cate v. Cate*, 50 N. H. 144, a question very similar to this was left undecided. But Bellows, C. J., says: "Upon a careful consideration of the cases, we think there is some preponderance of authority in favor of the position that, in a case like this, a party is in some form of action responsible for the consequences of his wrongful act, when they are distinctly traceable to that act, although such consequences may be both remote and accidental." In *Davis v. Garrett*, 6 Bing. 716, the defendant contracted to carry in his barge the plaintiff's lime, and the master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire the whole was lost.

The defendant was held liable for the lime, the cause of the loss being sufficiently proximate. The Court say in their opinion, delivered by Tindal, C. J.: "We think the real answer to the objection [that of remoteness] is, that no wrong-doer can be allowed to apportion or qualify his own wrong." But in *Greenland v. Chaplin*, 5 Exch. (W. H. & G.) 243, Pollock, C. B., says: "I am desirous that it may be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated."

Upon the other questions in the case I agree with my brethren, for the reasons given by them.

According to the views of a majority of the Court, there was

A new trial granted.

RYAN v. NEW YORK CENTRAL RAILROAD.

1866. 35 *New York*, 210.

Chas. Andrews, for appellant.

S. T. Fairchild, for respondent.

HUNT, J. On the 15th day of July, 1854, in the city of Syracuse, the defendant, by the careless management, or through the insufficient condition, of one of its engines, set fire to its woodshed, and a large quantity of wood therein. The plaintiff's house, situated at a distance of one hundred and thirty feet from the shed, soon took fire from the heat and sparks, and was entirely consumed, notwithstanding diligent efforts were made to save it. A number of other houses were also burned by the spreading of the fire. The plaintiff brings this action to recover from the railroad company the value of his building thus destroyed. The judge at the Circuit nonsuited the plaintiff, and the General Term of the fifth district affirmed the judgment.

The question may be thus stated: A house in a populous city takes fire, through the negligence of the owner or his servant; the flames extend to and destroy an adjacent building: Is the owner of the first building liable to the second owner for the damage sustained by such burning?

It is a general principle that every person is liable for the consequences of his own acts. He is thus liable in damages for the proximate results of his own acts, but not for remote damages. It is not easy at all times to determine what are proximate and what are remote damages. In *Thomas v. Winchester*, 2 Seld. 408, Judge Ruggles defines the damages for which a party is liable, as those which are the natural or necessary consequences of his acts. Thus, the owner of a loaded gun, who puts it in the hands of a child, by whose indiscretion it is discharged, is liable for the injury sustained by a third person from such discharge. 5 Maule & Sel. 198. The injury is a natural and ordinary result of the folly of placing a loaded gun in the hands of one ignorant of the manner of using it, and incapable of appreciating its effects. The owner of a horse and cart, who leaves them unattended in the street, is liable for an injury done to a person or his property, by the running away of the horse (*Lynch v. Nurdin*, 1 Adol. & Ellis, n. s. 29; *Illidge v. Goodwin*, 5 Car. & P. 190), for the same reason. The injury is the natural result of the negligence. If the party thus injured had, however, by the delay or confinement from his injury, been prevented from completing a valuable contract, from which he expected to make large profits, he could not recover such expected profits from the negligent party, in the cases supposed. Such damages would not be the necessary or natural consequences, nor the results ordinarily to be anticipated, from the negligence com-

mitted. 6 Hill, 522; 13 Wend. 601; 3 E. D. Smith, 144. So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed. *Field v. N. Y. Central R. R.*, 32 N. Y. 339. Thus far the law is settled and the principle is apparent. If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case. Where, then, is the principle upon which A. recovers and Z. fails?

It has been suggested that an important element exists in the difference between an intentional firing and a negligent firing merely; that when a party designedly fires his own house or his own fallow land, not intending, however, to do any injury to his neighbor, but a damage actually results, that he may be liable for more extended damages than where the fire originated in accident or negligence. It is true that the most of the cases where the liability was held to exist, were cases of an intentional firing. The case, however, of *Vaughan v. Menlove*, 32 Eng. C. L. 613, was that of a spontaneous combustion of a hay-rick. The rick was burned, the owner's buildings were destroyed, and thence the fire spread to the plaintiff's cottage, which was also consumed. The defendant was held liable. Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of the building upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. In the second, third, or twenty-fourth case, as supposed, the destruction of the building was not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that it was remote.

There are some cases which, from the frequency of their citation, and their apparent inconsistency with the view I have taken, should be considered in this connection. The case of *Scott v. Shepherd*, 2 Wm. Bl. 893, is that of the celebrated squib case. [Here follows a review of that case.]

The case of *Vandenburgh v. Truax*, 4 Denio, 464, is another case frequently cited upon this branch of the law. Some difficulty occurred between the defendant and a negro boy in the streets of Schenectady. The boy got loose from the defendant and ran away. The defendant took a pickaxe and followed the boy, who fled into the plaintiff's store, the defendant pursuing him there with the pickaxe in his hand. The boy ran behind the counter, as was supposed, to save himself from being struck with the axe, and in fleeing he knocked out the faucet from a cask of wine, and a portion of the liquor was spilled and lost. For that loss the plaintiff recovered damages in the justice's court where he commenced his action. The principle on which the action was sustained in the Supreme Court was, that the consequences complained of naturally and directly resulted from the careless or improper conduct of the defendant, and it is illustrated by the cases of the careless discharge of a gun, the letting loose a ferocious animal among a multitude of people, throwing a stone from a house into a street where people are passing. As the principle adopted by the Court was unquestionably sound, its particular application in that case is not material. It must be applied, according to sound judgment, in each case as it arises.

The same principle was announced in *Guille v. Swan*, 19 Johns. 381, where the defendant's balloon descended into the plaintiff's garden, and a crowd of people, rushing in to relieve him, as well as from motives of curiosity, trod down the plaintiff's vegetables and flowers. For the injury done by himself, as well as by the crowd, the defendant was held to be answerable. He was held to have substantially requested the presence of the crowd there, and, therefore, to have been responsible for the results of their action.

Without determining its effect, it will be observed, that the fact exists in each of these cases, that the first act or impulse was voluntary and intentional on the part of the defendant. *Shepherd* intentionally threw his squib; *Truax* intentionally drove the negro boy; and *Swan* intentionally descended into the plaintiff's garden and invoked the aid of the multitude. In each case, too, the result was deemed by the Court to be the inevitable consequence of the original unlawful or improper act. There would seem to be no inconsistency in principle between either of these cases and the conclusion already

announced in the present case. Whether the principle has been always correctly applied, it is not necessary to determine.

That the defendant is not liable in this action may also be strongly argued, from the circumstance that no such action as the present has ever been sustained in any of the courts of this country, although the occasion for it has been frequent and pressing. Particular instances are familiar to all, where such claims might have been made with propriety. The instance of the Harpers, occurring a few years since, is a striking one. 22 N. Y. 441. Their large printing establishment, in the city of New York, was destroyed by the gross carelessness of a workman, in throwing a lighted match into a vat of camphene. The fire extended, and other buildings and much other property was destroyed. The Harpers were gentlemen of wealth, and able to respond in damages to the extent of their liability. Yet we have no report in the books, and no tradition, of any action brought against them to recover such damages. The novelty of the claim, as was said by Judge Beardsley, in *Costigan v. M. & H. R. R. Co.*, where the occasion for its being made had been so common, is a strong argument against its validity. 2 Denio, 609. In *The People v. Clark*, 10 Barb. 143, Judge Cady says: "The fact that the plaintiffs have never before this commenced an action to vacate a grant made by the king, because it was made upon false suggestions, furnishes strong evidence that the plaintiffs never had the right to bring such an action." It was Littleton's rule, "what never was, never ought to be." 1 Ver. 385.

To sustain such a claim as the present, and to follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate. Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas, and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long exist, under the operation of such a principle. In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offence committed. It is to be considered, also, that if the negligent party is liable to the owner of a remote building thus consumed, he

would also be liable to the insurance companies who should pay losses to such remote owners. The principle of subrogation would entitle the companies to the benefit of every claim held by the party to whom a loss should be paid.

In deciding this case, I have examined the authorities cited from the Year Books, and have not overlooked the English statutes on the subject, or the English decisions extending back for many years. It will not be useful further to refer to these authorities, and it will be impossible to reconcile some of them with the view I have taken.

The remoteness of the damage, in my judgment, forms the true rule on which the question should be decided, and which prohibits a recovery by the plaintiff in this case.

Judgment should be affirmed.

✓HOYT v. JEFFERS.

1874. 30 *Michigan*, 181.¹

ERROR to Saginaw Circuit.

The original action was brought by Jeffers against Hoyt, to recover damages for certain wooden buildings of Jeffers, alleged to have been burned by fire communicated from Hoyt's steam saw-mill, and which was so communicated by Hoyt's negligent management. Jeffers' buildings burned were, first, a hotel, situated about two hundred and thirty-three feet from the saw-mill, and on the other side of the street; second, a barn about five feet distant from the shed attached to the hotel; third, a wash-house about six feet from the barn. The jury returned a verdict for the plaintiff which presumably included damages for all the buildings.

John J. Wheeler and *Pond & Brown*, for plaintiff in error.

I. M. & H. P. Smith and *Gaylord & Hanchett*, for defendant in error.

CHRISTIANCY, J. [after stating the facts, and overruling other exceptions]. The only remaining exception which requires notice is to that portion of the charge in which the Court says to the jury, after fairly submitting the question of the burning of the Sherman House through defendant's negligence, "If you find as a fact that the fire passed from the building to the other property of the plaintiff upon the same lot, and immediately adjoining, without any other cause than simply the fire naturally burning and consuming the first building, you should give, in addition to the value of the first building, the value of the other buildings destroyed, situate there upon the property, with

¹ The statement of facts has been condensed, and several points omitted.

interest, the same as the other, from the time of its destruction." This charge must be understood with reference to the evidence, which showed that the woodshed of the house separated the barn from the house, that the barn was about five feet from the shed, and the wash-house about six feet from the barn, and all were of wood.

In view of the facts, the very statement of the proposition contended for by the plaintiff in error must, upon every sound principle, be held to carry with it its own refutation. As well might it be contended that, because the fire caught in a particular spot on the outside of the Sherman House, which was the only direct result of the negligent use of defendant's chimney, he could not be held for the burning of the inside of the house, or any portion of the outside which caught only by the spread of the fire first kindled by the sparks.

If we are to refine upon questions of this kind, in defiance of practical common sense, the defendant's liability might just as well, upon strict scientific principles, be confined to still narrower limits. The argument is, that, though defendant may be liable for the loss of the particular building first set on fire through his negligence, and such others as are in actual contact with it, yet his liability cannot be extended to others not in such actual contact, or where there is an intervening space, however small, between them. Now, it is so well settled as to be treated almost as an axiom in natural philosophy, that no two particles of matter actually touch each other, and that there is always an intervening space between them. The defendant's liability must, therefore, be confined to the particular particle or particles of matter which actually first caught fire, and the whole conflagration resulting, not only of the remainder of the particular board or shingle, but of the house, must be treated as a new consequential injury too remote to serve as a safe ground of damages.

This, it may be said, is unreasonable, and ludicrously absurd; and so it is; but it is slightly more absurd or ludicrous than it would be to hold that defendant's liability must be limited to the first building burned, because the others were not a part of it, or in actual contact with it, but five or six feet distant. If such other buildings are satisfactorily shown to have been actually burned by the fire of the Sherman House, caused by the negligence of the defendant, and especially if this was, under the circumstances, the natural and probable, as well as the actual result of the fire so caused, and without any contributory negligence of the plaintiff, I can see no sound principle which can make the defendant's liability turn upon the question whether the buildings thus burned by the fire of the first, were five, six, or fifty feet, or the one-hundredth part of an inch from it.

And though a building thus burned by the fire of the first might be at such a distance that its taking fire from the first might not, *a priori*, have seemed possible, yet if it be satisfactorily shown that it did, in fact, thus take fire, without any negligence of the owner, and without the fault of some third party, which could properly be recognized as

the proximate cause, and for which he could be held liable, the principle of justice or sound logic, if there be any, is very obscure, which can exempt the party through whose negligence the first building was burned, from equal liability for the burning of the second. If it be said that this extent of liability might prove ruinous to the party through whose negligence the buildings were burned, it may be said, in reply, that, under such circumstances, it is better, and more in accordance with the relative rights of others, that he should be ruined by his negligence, than that he should be allowed to ruin others who are innocent of all negligence or wrong.

I see no error in the record, and the judgment should be affirmed, with costs.

LAWRENCE, J., IN FENT v. TOLEDO, &C. RAILWAY COMPANY.

1871. 59 *Illinois*, 357-358, 359-362.

WE now come to the two cases chiefly relied upon by appellee's counsel. They are quite in point, but we are wholly unable to agree with their conclusions. One is *Ryan v. The New York Central Railroad Co.*, 35 N. Y. 214, and the other is *Kerr v. The Pennsylvania Railroad Co.*, decided by the Supreme Court of Pennsylvania, at its May term, 1870. These two cases stand alone, and we believe they are directly in conflict with every English or American case, as yet reported, involving this question.

As we understand these cases, they hold that, where the fire is communicated by the locomotive to the house of A., and thence to the house of B., there can be no recovery by the latter. It is immaterial, according to the doctrine of these cases, how narrow may be the space between the two houses, or whether the destruction of the second would be the natural consequence of the burning of the first. The principle laid down by these authorities and urged by counsel in this case is, that, in order to a recovery, the fire which destroys the plaintiff's property must be communicated directly from the railway, and not through the burning of intermediate property.

Both these opinions, upon which we are commenting, expressly admit, as both Courts have decided, that if through the negligence of a railway company, fire is communicated to the building of A., he may recover. But suppose the building is a wooden tenement, one hundred feet in length, extending from the railway. In the Pennsylvania case, the second building was only thirty-nine feet from the first. We presume that Court would hold, and appellee's counsel would admit, that A. might recover for the value of his entire building, one hundred feet in length. But suppose B. owns the most remote fifty feet of the

building, could he recover? We suppose not, under the rule announced in these cases. But why should he not, under any definition of proximate cause that has ever been given by any Court or text writer? Take that of Greenleaf, with which counsel for appellee claim to be content. He says the damage must be "the natural and proximate consequence of the act complained of." Is not the burning of the second fifty feet of the building in the case supposed, the natural and proximate consequence of the act complained of, to wit, the careless ignition of the first fifty feet? If it is admitted that there may be a recovery for the second fifty feet of the building as well as for the first, when there is one continuous building, and whether owned by one person or by two, is it possible that, when the second fifty feet is removed a short space from the first, but still is so near that the burning of the one makes almost certain the destruction of the other, there can be no recovery? Is not the burning of the second building still "the natural and proximate consequence of the act complained of?" It seems to us that the arbitrary rule enforced in these two cases, which is simply this, that when there is negligence, there may be a recovery for the first house or field, but in no event for the second, rests on no maintainable ground, and would involve the administration of the law in cases of this character in absurd inconsistencies. We believe there is no other just or reasonable rule than to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency — if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind — such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible.

The Court of Appeals in New York, and the Supreme Court of Pennsylvania, seem, from their opinions, to have attached great weight to an argument urged upon us by the counsel for appellee, and indeed that argument seems to have been the chief reason for announcing a rule which both courts struggle in vain to show is not in conflict with all prior adjudications. That argument is, in brief, that an entire village or town is liable to be burned down by the passing of the fire from house to house, and if the railway company, whose locomotive has emitted the cinders that caused the fire, is to be charged with all the damages, these companies would be in constant danger of bank-

ruptcy, and of being obliged to suspend their operation. We confess ourselves wholly unable to see the overpowering force of this argument. It proceeds upon the assumption that, if a great loss is to be suffered, it had better be distributed among a hundred innocent victims than wholly visited upon the wrong-doer.

As a question of law or ethics, the proposition does not commend itself to our reason. We must still cling to the ancient doctrine, that the wanton wrong-doer must take the consequences of his own acts, whether measured by a thousand dollars or a hundred thousand.

As to the railroads, however useful they may be to the regions they traverse, they are not operated by their owners for benevolent purposes, or to promote the public welfare. Their object is pecuniary profit. It is a perfectly legitimate object, but we do not see why they should be exempted from the moral duty of indemnification for injuries committed by the careless or wanton spread of fire along their track, because such indemnity may sometimes amount to so large a sum as to sweep away all their profits. The simple question is, whether a loss, that must be borne somewhere, is to be visited on the head of the innocent or the guilty. If, in placing it where it belongs, the consequence will be the bankruptcy of a railway company, we may regret it, but we should not, for that reason, hesitate in the application of a rule of such palpable justice.

But is it true that railroads cannot thrive under such a rule? They have now been in operation many years, and extend over very many thousand miles, and we have never yet heard of town or village that has been destroyed by a fire ignited by their locomotives. Improved methods of construction, and a vigilant care in the management of locomotives, have made the probability of loss from this cause so slight that we cannot but regard the fears of the disastrous consequences to the railway companies which may follow from an adherence to the ancient rule, as in a large degree chimerical. A case may occur at long intervals in which they will be required to respond in heavy damages; but better this, than that they should be permitted to evade the just responsibilities of their own negligence, under the pretence that the existence of the road may be endangered. It were better that a railway company should be reduced to bankruptcy, and even suspend its operations, than that the courts should establish for its benefit a rule intrinsically unjust, and repugnant not merely to ancient precedent, but to the universal sense of right and wrong.

MILWAUKEE AND SAINT PAUL RAILWAY COMPANY
v. KELLOGG.1876. 94 *United States*, 469.¹

ERROR to the Circuit Court of the United States for the District of Iowa.

The original action was brought by Kellogg to recover compensation for the destruction by fire of the plaintiff's saw-mill and a quantity of lumber, situated and lying in the State of Iowa, and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions, it appears that the "plaintiff alleged the fire was negligently communicated from the defendants' steamboat 'Jennie Brown' to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's saw-mill and lumber piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial it was admitted that the defendants owned the steamboat and elevator; that the mill was five hundred and thirty-eight feet from the elevator, and that the nearest of plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it."

The jury returned a verdict for plaintiff; and found specially, 1st, That the elevator was burned from the steamer "Jennie Brown"; 2d, that such burning was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time; and 3d, that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator.

Mr. John W. Cary, for plaintiff in error.

Mr. Myron H. Beach, for defendants in error.

STRONG, J. [After stating the case and deciding other questions.] The next exception is to the refusal of the Court to instruct the jury as requested, that "if they believed the sparks from the 'Jennie Brown' set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the Court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burn-

¹ The statement of facts has been abridged, and a part of the case omitted.—ED.

ing of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the Court assumed that it was a question of law in this case; and in its support the two cases of *Ryan v. The New York Central Railroad Co.*, 35 N. Y. 210, and *Kerr v. Pennsylvania Railroad Co.*, 62 Penn. St. 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. *Webb v. The Rome, Watertown & Ogdensburg Railroad Co.*, 49 N. Y. 420, and *Pennsylvania Railroad Co. v. Hope*, 80 Penn. St. 373. And certainly they are in conflict with numerous other decided cases. *Kellogg v. The Chicago & North-western Railroad Co.*, 26 Wis. 224; *Perley v. The Eastern Railroad Co.*, 98 Mass. 414; *Higgins v. Dewey*, 107 id. 494; *Fent v. The Toledo, Peoria, & Warsaw Railroad Co.*, 49 Ill. 349.

The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place, 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill and

the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions, the Circuit Court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This,

in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed.

Judgment affirmed.

HOAG, ET AL. v. LAKE SHORE, &C. RAILROAD COMPANY.

1877. 85 *Pennsylvania State*, 293.¹

Charles W. Mackey, for plaintiffs in error.

McCalmont & Osborn, for defendants in error.

PAXSON, J. This was an action on the case to recover compensation for certain property destroyed by fire, caused, as was alleged, by the negligence of the defendants. The facts, so far as they are essential to elucidate the point in controversy, are as follows: The plaintiffs were the occupiers of a piece of land situated within the limits of Oil City, on the western bank of Oil Creek. The railroad of defendants is constructed along said creek, over the land of the plaintiffs and at the base of a high hill. On the afternoon of April 5, 1873, during a rain storm, there was a small slide of earth and rock from the hill-side down to and upon the railroad. About ten minutes prior to the accident, one of the defendants' engines had passed over the road in safety. At that time no slide had occurred. This engine was followed in a few minutes by another engine drawing a train of cars loaded with crude oil in bulk. The latter engine ran into the slide, was thrown off the track, ran on about one hundred to one hundred and fifty feet, when the tender, which was in front of the engine, was overturned into Oil Creek; the engine itself was partly overturned; two or three oil cars became piled up on the track and burst. The oil took fire, was carried down the creek, then swollen by the rain, for several hundred feet, set fire to the property of the plaintiffs and partly consumed it. The question of negligence in defendants' engineer in not seeing the obstruction and stopping his train before reaching it is not raised upon this record, and need not be discussed. The only question for our consideration is, whether the negligence of the defendants' servants was the proximate cause of the injury to the plaintiffs' property. The answer to the plaintiffs' third point, embraced in the second specification of error, raises this question distinctly. The Court was asked to say: "That if the jury believe from the evidence, that the accident complained of was the result of negligence on the part of the defendant, and that by reason of such negligence, the oil, ignited by the engine attached to the train, ran immediately down to Oil Creek, where it was carried by the current in the space of a few minutes to the property of

¹ The statement of facts and the arguments of counsel are omitted. — ED.

the plaintiffs, when it set fire to and destroyed said property, the plaintiffs are entitled to recover, provided they did not in any manner contribute to said accident." The Court answered this point in the negative, and then instructed the jury that as a matter of law, upon the facts in the case, the plaintiffs were not entitled to recover, which instruction is assigned here for error.

It was strongly urged that the Court erred in withdrawing the case from the jury, and the recent cases of *Pennsylvania Railroad Co. v. Hope*, 30 P. F. Smith, 373, and *Raydure v. Knight*, 2 W. N. C. 713, were cited as supporting this view. In the case first cited it was said by the Chief Justice, in delivering the opinion of the Court, "We agree with the Court below that the question of proximity was one of fact peculiarly for the jury. How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendants." The case of *Raydure v. Knight* was meagrely presented; the charge of the Court was not sent up, and a majority of the Court were of opinion that no sufficient cause for reversing the judgment had been shown. I am unable to see any special bearing this case has upon the question before us. The doctrine laid down in the *Railroad Co. v. Hope*, and to be gathered incidentally perhaps from *Raydure v. Knight* is, that the question of proximate cause is to be decided by the jury upon all the facts in the case; that they are to ascertain the relation of one fact to another, and how far there is a continuation of the causation by which the result is linked to the cause by an unbroken chain of events, each one of which is the natural, foreseen, and necessary result of such cause. But it has never been held that when the facts of a case have been ascertained, the Court may not apply the law to the facts. This is done daily upon special verdicts and reserved points. Thus in the *Railroad Co. v. Kerr*, 12 P. F. Smith, 353, a case bearing a striking analogy to this, the Court submitted the question of negligence to the jury, but reserved the question of proximate cause upon the undisputed facts of the case. Of course this could not have been done if the facts were in dispute. A reserved point must be based upon facts admitted in the cause or found by the jury. In questions of negligence it has been repeatedly held that certain facts when established amount to negligence *per se*: *Railroad Co. v. Stinger*, 28 P. F. Smith, 219; *McCully v. Clarke*, 4 Wright, 399; *Pennsylvania Railroad Co. v. Barnett*, 9 P. F. Smith, 259; while in *Raydure v. Knight*, *supra*, the Court below, in answer to the defend-

ants' second point, instructed the jury that if certain facts were believed by them, the negligence complained of was the proximate cause of the injury to plaintiff's property. This ruling was affirmed by this Court. I do not understand the decision in the *Railroad Co. v. Hope*, to be in conflict with this view. It remains to apply this principle to the case before us. There is not a particle of conflict in the evidence, so far as it affects the question of proximate cause. This was doubtless the reason why the plaintiffs assumed the facts in their third point. They would not have been justified in doing so had not the facts been admitted, nor is it likely the learned judge would have answered it. We may, therefore, regard the plaintiff's third point as a prayer for instructions upon the undisputed facts of the case. Can it be doubted that the Court had the right to give a binding instruction? We think not.

But one question remains. Was the negligence of the defendants' servants, in not seeing the land-slide, and stopping the train before reaching it, the proximate cause of the destruction of the plaintiff's property? We need not enter into an extended discussion of the delicate questions suggested by this inquiry. That has been done so fully in two of the cases cited as to render it unnecessary. A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum*, so far as it applies to the practical business of life. We think this difficulty may be avoided by adhering to the principle substantially recognized in *The Railroad Co. v. Kerr*, and *The Railroad Co. v. Hope*, *supra*, that in determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence, — such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act. This is not a limitation of the maxim *causa proxima non remota spectatur*; it only affects its application. There may be cases to which such a rule would not apply, but this certainly is not one. It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the land-slide. The obstruction itself was unexpected. An engine had passed along within ten minutes, with a clear track. But the obstruction was there, and the tender struck it. The probable consequences of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil-tanks; the oil taking fire; the burning oil running into and being carried down the stream; and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiff's building? This would be a severe rule to apply, and might have made the defendants responsible for the destruc-

tion of property for miles down Oil Creek. The water was an intervening agent, that carried the fire, just as the air carried the sparks in the case of the *Railroad Co. v. Kerr*. It is manifest that the negligence was the remote and not the proximate cause of the injury to the plaintiff's building. The learned judge ruled the case upon sound principles, and his judgment is affirmed.¹

POLLOCK, C. B., IN *GREENLAND v. CHAPLIN*.

1850. 5 *Exchequer*, 248.

I ENTERTAIN considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur.

¹ A contrary result was reached in the very similar case of *Kuhn v. Jewett*, 32 New Jersey Equity, 647, decided in 1880. VAN FLEET, Vice-Chancellor, said, pp. 650-651: "Although water is almost universally used as a means to extinguish fire, and it seems, at first blush, to be absurd to say that it can be used for the purpose of extending it, yet it is true, as a matter of fact, that as an agency for the transmission of burning oil, it is just as certain and effectual in its operations as the wind in carrying flame or a spark, or combustible matter in spreading a fire. In keeping up the continuity between cause and effect, it may be just as certain and effectual in its operation as any other material force. In this instance, it carried the consequences of the defendant's negligence to the petitioners' property, with almost as much certainty and directness as if the burning oil had descended upon it in obedience to the law of gravitation.

"This view is in conflict with that pronounced by the Supreme Court of Pennsylvania in *Hoag v. Lake Shore & Michigan Southern R. R. Co.*, 85 Pa. St. 293, a case which, in its facts, is substantially the counterpart of the one in hand. The water of a running stream was there held to be an intervening agency sufficiently independent and powerful to constitute a new force, without which the injury might not have happened; and it was, therefore, held that it caused a sufficient break in the chain of causation to relieve the defendant from liability. The capacity and adaptability of a running stream as an agency for the transmission of burning oil, and its similitude to other material forces as a means of communicating this species of fire, does not seem to have been considered by the Court, at least no allusion is made to it." — ED.

SMITH v. LONDON AND SOUTHWESTERN RAILWAY COMPANY.

1870. *Law Reports, 6 Common Pleas, 14.*¹

APPEAL to the Exchequer Chamber from a decision of the Court of Common Pleas, L. R. 5 Com. Pl. 98, discharging a rule to enter a verdict for the defendants or a nonsuit.

This was an action for negligence, whereby it was alleged that plaintiff's cottage was burned.

The defendants pleaded not guilty, and issue was joined thereon.

The case was tried before Keating, J., at the summer assizes, 1869, held at Dorchester, when evidence was given for the plaintiff which was in substance as follows:—

It was proved that the defendants' railway passed near the plaintiff's cottage, and that a small strip of grass extended for a few feet on each side of the line, and was bounded by a hedge which formed the boundary of the defendants' land; beyond the hedge was a stubble-field, bounded on one side by a road, beyond which was the plaintiff's cottage. About a fortnight before the fire the defendants' servants had trimmed the hedge and cut the grass, and left the trimmings and cut grass along the strip of grass. On the morning of the fire the company's servants had raked the trimmings and cut-grass into small heaps. The summer had been exceedingly dry, and there had been many fires about in consequence. On the day in question, shortly after two trains had passed the spot, a fire was discovered upon the strip of grass land forming part of the defendants' property; the fire spread to the hedge and burnt through it, and caught the stubble-field, and, a strong wind blowing at the time, the flames ran across the field for 200 yards, crossed the road, and set fire to and burnt the plaintiff's cottage. There was no evidence that the defendants' engines were improperly constructed or worked; there was no evidence except the fact that the engines had recently passed, to show that the fire originated from them. There was no evidence whether the fire originated in one of the heaps of trimmings or on some other part of the grass by the side of the line; but it was proved that several of the heaps were burnt by the fire. Two of the company's servants were proved to have been close to the spot when the fire broke out, and to have given the alarm, but they were not called by either side.

At the close of the plaintiff's case the counsel for the defendants submitted that there was no case to go to the jury. At the suggestion of the judge, and by consent, a verdict was taken for the plaintiff for 30*l.*, subject to leave reserved to the defendants to move to set it

¹ The statement of facts has been abridged. The arguments, and portions of the opinions, are omitted.—*Ed.*

aside, and instead thereof to enter a verdict for them, on the ground that there was no evidence to go to the jury of any liability on the part of the defendants. The Court to be at liberty to draw inferences and to amend the pleadings.

The defendants applied for and obtained a rule pursuant to the leave reserved, which, after argument, was discharged, Law Rep. 5 C. P. 98, and from the judgment so given discharging the rule the present appeal was brought.

Kingdon, Q. C. (*Murch* with him), for defendants.

Cole, Q. C. (*Bere*, Q. C., with him), for plaintiff.

KELLY, C. B. [After holding that there was some evidence of negligence on the part of the defendants, and negligence which caused the damage complained of.] Then comes the question raised by Brett, J., to which at first I was inclined to give some weight. He puts it thus: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding that they were of the best construction, and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage." It is because I thought, and still think, the proposition is true that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described that I felt pressed at first by this view of the question; but on consideration I do not feel that that is a true test of the liability of the defendants in this case. It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability, and that the judgment of the Court below must be affirmed.

CHANNELL, B. I am of the same opinion. I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell, B., in his judgment in *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781; 25 L. J. (Ex.) 212, referred to by Mr. Kingdon; but when it has been once determined that there

is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

BLACKBURN, J. I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. I have still some doubts whether there was any evidence that they were negligent, but as all the other judges are of opinion that there was evidence that they were, I am quite content that the judgment of the Court below should be affirmed. I do not dissent, but I have some doubt, and will state from what my doubt arises. [After discussing this question, the learned judge continued.] But I doubt on this point, and, therefore, doubt if there was evidence of negligence; if the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person fires across a road when it is dangerous to do so and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a laborer.

[Opinions were also delivered by MARTIN, B., PIGOTT, B., and LUSH, J. BRAMWELL, B., concurred in the decision.]

Judgment affirmed.

MARVIN v. CHICAGO, &c. RAILWAY COMPANY.

1891. 79 *Wisconsin*, 140.¹

APPEAL from Circuit Court.

Action to recover damages for the burning over of plaintiff's cranberry marsh, on Monday, by fire alleged to have originated by defendant's negligence on the preceding Wednesday, at a place two and one-half miles from plaintiff's land.

John T. Fish, for appellant.

Rogers & Hall, for respondents.

¹ Only such parts of the case are given as relate to the point discussed in the extract from the opinion. The statement of facts is abridged from that in the opinion. The arguments are omitted. — Ed.

COLE, C. J. [After stating the case, and discussing other questions.] Again, there must be no intervening cause not necessarily following the first negligent act.

There are very strong grounds for saying, upon the testimony disclosed in the record, that there was an intervening cause in this case. The witnesses described the fire in the Beaver bottom, on Monday, and say that it was not supposed it could cross the ridge east of the plaintiff's marsh; but while they were fighting the fire on the bottom, which was running among the old trees and grass, there came a heavy north-west wind through or among the trees, and carried a brand of fire across the ridge into a little marsh adjoining or connected with the main marsh, which spread thence to the plaintiff's cranberry marsh. It is very probable, had it not been for this "whirlwind," as the witness calls it, which blew the burning brand over the ridge on the small marsh adjoining the plaintiff's cranberry ground, the fire would not have reached their property, even if it be assumed that the fire from the right of way extended to or reached in its course the river bottom.

In this state of the proof, as to there being an intervening cause within the meaning of the authorities, and as to the uncertainty about the first fire, which originated on the right of way, ever having in its course extended to the plaintiff's property and destroyed it, we think it was error in the trial Court to have denied the motion for a new trial. Under the circumstances such motion should have been granted.

BY THE COURT. — The judgment of the Circuit Court is reversed, and a new trial ordered.

POEPPERS v. MISSOURI, &c. RAILWAY COMPANY.

1878. 67 *Missouri*, 715.¹

APPEAL from Pettis Circuit Court. Hon. Wm. T. Wood, Judge.

John Montgomery, Jr., for appellant.

Claycomb & Gray, for respondent.

NAPTON, J. Notwithstanding the multitude of decisions, here and elsewhere, in regard to the responsibility of railroad companies for fires escaping from their engines, the present case undoubtedly presents some novel features, which have occasioned some hesitation in applying to it principles which, after considerable conflict, seem to be now pretty well settled. The facts in this case are that some sparks from a locomotive of defendant set fire to the prairie, about 2 o'clock on the evening of the 23d day of November, 1872, near the track, and the grass being very rank and dry, and the wind being high, the fire

¹ Part of the case is omitted; also the citations of counsel. — ED.

extended about two and a half or three miles before night, and continued to burn during the night, though slowly; but in the morning the wind rose again and blew hard, as was not unusual in that country, and carried the fire some five miles further, until it reached plaintiff's farm, about 9 or 10 o'clock on the 24th, and burned over a fire-line of about sixteen feet of ploughed ground and destroyed the property of the plaintiff.

[The Court, at plaintiff's request, gave, among others, the following instruction:—]

6. The Court instructs the jury that, although they must, in finding a verdict in this case, be governed by the maxim that every one is liable for the natural and proximate, but not for the remote, damages occasioned by his acts, yet this maxim is not to be controlled by time and distance; and if the jury believe from the evidence that there was but one burning, one continuous conflagration, from the time the fire was set at or near the railroad track till, by its natural extension, it extended to and burned plaintiff's property, in such a manner as to constitute but one event, one continuous burning, and that the damage complained of was, under the surrounding circumstances, the natural result of the escape of the fire from the engine of the defendant, through defendant's negligence, then they will find for the plaintiff, if they shall further find that said damage was not caused by any fault of the plaintiff.

[The defendant requested, among others, the following instruction, which the Court declined to give:—]

3. If the jury believe from the evidence that the burning of plaintiff's property was not such a usual and natural result of the negligent acts of defendant as a prudent and careful person would, under usual and ordinary circumstances, reasonably have anticipated, you will find your verdict for the defendant.

It will be perceived that two points are presented by the facts and the instructions to the jury; First, whether the question of negligence was properly submitted to the jury; and, secondly, whether the instructions in regard to proximate and remote causes were correct. In regard to this last topic, I do not propose to go into a discussion of the subject generally, since elementary treatises and judicial opinions have, we think, pretty well exhausted it, as the cases referred to in the briefs on either side will show. We see no material objection to the instructions given by the court for the plaintiff. The sixth instruction is the one principally objected to, but, keeping in view the facts on which this instruction was based, we think it was not calculated to mislead. Although the instruction announces the rather startling proposition that neither time nor distance controls the decision of the question of proximate and remote damages, it is at the same time declared in the instruction that the damages must be the natural result of the fire, originated by the negligence of the defendant. This seems

to be in accordance with the doctrine generally sanctioned, that proximate damages are such as would be reasonably anticipated by a prudent man. The evidence showed that there was no intervention of a new agency in the destruction of plaintiff's property. The fluctuations of the wind at the season of the year when this fire occurred is nothing remarkable or extraordinary, as the testimony in this case shows. The cessation of the wind at nightfall on the prairie is a matter of course, and the increase of the wind the next morning is a circumstance which might well be anticipated. We do not regard this as an intervention of a new agent, relieving the wrong-doer of responsibility. Had the wind been on the next day extraordinary, not to have been anticipated, it might have been considered a *casus*, but the evidence in this case shows that the violent wind on the day succeeding the starting of the fire was not an infrequent occurrence at that season of the year. It is agreed by the witnesses on both sides that such winds, though somewhat unusual, frequently blow in that section of the country. The instructions asked by defendant on this point seem principally directed to a state of facts of which there was no proof. Abstractly considered, they were undoubtedly law, and some of them might well have been given.

Judgment affirmed.

HILL v. WINSOR.

1875. 118 *Massachusetts*, 251.¹

TORT against the owners of a steam-tug for personal injuries sustained by the plaintiff, through the alleged negligence of those in charge of the tug in causing her to strike violently against the fender of Warren Bridge, on which the plaintiff was at work. The fender, which was built to protect the bridge, consisted of piles driven perpendicularly into the bed of the stream, about twelve feet apart, with other piles driven at an angle to each of these, one of which was fastened to the top of each perpendicular pile, with a cap on top extending along the whole row of piles. Plaintiff was at work standing on a plank nailed to the piles, and, in order to fit an inclined pile to the perpendicular one and the cap, he had put in a brace about a foot long to keep the inclined pile and the upright one apart while he was at work. While the plaintiff was so at work, he saw the tug coming towards the fender, and, before he could get on the cap, the tug struck the fender about three piles from him, the jar caused the brace between the piles to fall out, the piles came together, the plaintiff was caught between them and severely injured.

¹ The statement of facts has been much abridged, and the greater part of the case omitted. — ED.

Bacon, J., after giving full instructions as to what would constitute negligence, further instructed the jury as follows:—

“The accident must be caused by the negligent act of the defendants; but it is not necessary that the consequences of the negligent act of the defendants should be foreseen by the defendants. It is not necessary that either the plaintiff or the defendants should be able to foresee the consequences of the negligence of the defendants in order to make the defendants liable. It may be a negligent act of mine in leaving something in the highway. It may cause a man to fall and break his leg or arm, and I may not be able to foresee one or the other. Still, it is negligence for me to put this obstruction in the highway, and that may be the natural and necessary cause. In this case, it is for the jury to say whether this injury, which the plaintiff suffered, was a natural and necessary consequence of the negligence of the defendants, if they were negligent.”

O. W. Holmes, Jr., and W. A. Munroe, for defendants.

E. H. Derby and W. C. Williamson, for plaintiff.

COLT, J. [omitting part of opinion]. It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. *Lane v. Atlantic Works*, 111 Mass. 136, and cases cited. [Omitting opinion on other points.] *Exceptions overruled.*

SCHEFFER v. WASHINGTON, &c. RAILROAD CO.

1881. 105 *United States*, 249.

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The facts are stated in the opinion of the Court.

Mr. George A. King, with whom were *Mr. Charles King* and *Mr. John B. Sanborn*, for the plaintiffs in error.

Mr. Linden Kent, contra.

MR. JUSTICE MILLER delivered the opinion of the Court.

The plaintiffs, executors of Charles Scheffer, deceased, brought this action to recover of the Washington City, Virginia Midland and Great Southern Railroad Company damages for his death, which they allege resulted from the negligence of the company while carrying him on its road. The defendant's demurrer to their declaration was sustained,

and to reverse the judgment rendered thereon they sued out this writ of error.

The statute of Virginia under which the action was brought is, as to the question raised on the demurrer, identical with those of all the other States, giving the right of recovery when the death is caused by such default or neglect as would have entitled the party injured to recover damages if death had not ensued.

The declaration, after alleging the carelessness of the officers of the company, by which a collision occurred between the train on which Scheffer was and another train, on the seventh day of December, 1874, proceeds as follows:—

“Whereby said sleeping-car was rent, broken, torn, and shattered, and by means whereof the said Charles Scheffer was cut, bruised, maimed, and disfigured, wounded, lamed, and injured about his head, face, neck, back, and spine, and by reason whereof the said Charles Scheffer became and was sick, sore, lame, and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, so produced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy, and prostrate the nervous system of him, the said Charles Scheffer, to wit, from the seventh day of December, A. D. 1874, to the eighth day of August, 1875, when said phantasms, illusions, and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions, and forebodings, which he then and there did, whereby and by means of the careless, unskilful, and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to wit, on the eighth day of August, 1875, lost his life and died, leaving him surviving a wife and children.”

The Circuit Court sustained the demurrer on the ground that the death of Scheffer was not due to the negligence of the company in the judicial sense which made it liable under the statute. That the relation of such negligence was too remote as a cause of the death to justify recovery, the proximate cause being the suicide of the decedent, — his death by his own immediate act.

In this opinion we concur.

Two cases are cited by counsel, decided in this Court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other; and, though relied on by plaintiffs, we think they both sustain the judgment of the Circuit Court.

The first of these is *Insurance Company v. Tweed*, 7 Wall. 44.

In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur “by means of

any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane.”

An explosion took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse, — the one insured, situated across the street from Marshall warehouse, — and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned. This Court held that the explosion was the proximate cause of the loss of the Alabama warehouse, because the fire extended at once from the Marshall warehouse, where the explosion occurred. The Court said that no new or intervening cause occurred between the explosion and the burning of the Alabama warehouse. That if a new force or power had intervened, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote.

This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found.

In *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, the sparks from a steam ferryboat had, through the negligence of its owner, the defendant, set fire to an elevator. The sparks from the elevator had set fire to the plaintiff's saw-mill and lumber-yard, which were from three to four hundred feet from the elevator. The Court was requested to charge the jury that the injury sustained by the plaintiff was too remote from the negligence to afford a ground for a recovery.

Instead of this, the Court submitted to the jury to find “whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which under the circumstances would not naturally follow from the burning of the elevator, and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected.”

This Court affirmed the ruling, and in commenting on the difficulty of ascertaining, in each case, the line between the proximate and the remote causes of a wrong for which a remedy is sought, said: “It is admitted that the rule is difficult. But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.” To the same effect is the language of the Court in *McDonald v. Snelling*, 14 Allen (Mass.), 290.

Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death.

The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment, to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death.

Judgment affirmed.

BISHOP v. ST. PAUL CITY RAILWAY COMPANY.

SUPREME COURT OF MINNESOTA, JANUARY 14, 1892.

50 *Northwestern Reporter*, 927.

APPEAL from District Court, Ramsey County.

Action to recover for injuries received through defendant's negligence by the upsetting of a car on defendant's cable-line of street railway. Verdict and judgment for plaintiff. Defendant appeals.

Henry J. Horn, for appellant.

Munn, *Boyeson*, and *Thygeson*, for respondent.

DICKINSON, J.¹ . . . 2. The case presents the question as to whether the plaintiff's grave infirmities, which became manifest some time after the accident, were a result of the accident. The plaintiff was standing in the rear car or coach, supporting himself by holding on straps suspending from the upper part of the car for that purpose. When the car was thrown on its side, as it reached the curve in its rapid descent, he was thrown down, the impulse being such as to break his hold on the supporting straps. He immediately became unconscious, but regained consciousness in a few moments, and did not then seem to have been very seriously injured. On the right side of his head, above the ear, were a few cuts, apparently not very harmful, and a small contusion, the marks of which disappeared within a few days. He went about his business the same day, and continued to do so thereafter for a considerable period of time. But while, according to the proof, he had always before the accident been in good health,

¹ Only so much of the opinion is given as relates to one point. — Ed.

and had never suffered the ills or exhibited the symptoms which followed it, the evidence goes to show that from that time on a marked change became manifest in his physical and mental condition. He became nervous and irritable; was troubled with inability to sleep; suffered a dull, heavy pain in the back of the head, extending sometimes further down the back. There was a feeling of pressure within the head, as though it would burst. When sleeping, the scene of the accident was repeatedly pictured to his mind in dreams. His mental functions were affected, his mind being "muddled," as he expresses it. These conditions did not pass away, but became more aggravated, and on the 5th of September, some seven months after the accident, without other apparent cause than the circumstances here referred to, paralysis supervened, involving the whole left side. The paralytic condition still continues, and, according to the opinions of competent expert witnesses, will always exist. The plaintiff was 50 years of age. While upon this appeal the facts must, without doubt, be taken to be as above indicated, the question was closely contested as to whether the paralysis, caused immediately by the rupture of a blood-vessel in the brain, is a result of the accident and the shock and injury then received. A careful examination of the voluminous evidence-bearing upon this point shows that the verdict in favor of the plaintiff is certainly justified. The proof was chiefly the testimony of numerous competent medical experts. The examination of these witnesses on both sides was conducted with marked intelligence, skill, and thoroughness; and while these witnesses, whose competency to testify on the subject is beyond question, do not agree in their opinions, it seems apparent that the jury were as well informed as they could be, from the nature of the case, to form a correct conclusion. It is needless to here enter into any extended statement of the pathology of the case, as given by these witnesses, or to contrast the views and reasons given for their opinions. There is little or no controversy over the fact that the rupture of the blood-vessel causing the paralysis is to be ascribed to a degeneration or impaired condition of the blood-vessel, the process of which degeneration might have extended over a considerable period of time before the occurrence of the rupture. But whether such degeneration or impairment of health of the blood-vessels was or could have been caused by the accident and injury then received the experts disagree. Upon this point we will only say that the opinion of several competent witnesses is that it was so caused, and it may be added that one of the explanations given for such an opinion is that the physical concussion (which produced temporary unconsciousness) and the mental shock affected and impaired the nutrition of the nerve cells of the brain which preside over and control the circulation of blood in that organ, so that the blood-vessels became distended from an excessive flow of blood, and gradually degenerated, and became weakened, until they were incapable of resisting the pressure. In support of the opinions of experts in favor of

the plaintiff's side of this issue are to be considered also the facts, which the evidence tended to show, of the health of the plaintiff up to the time of the accident; that the ills which he suffered from that time on indicated an excess or unnatural pressure of blood in the brain; and that an examination of the plaintiff disclosed no disease or functional derangement of other organs to which the paralysis might be attributed.

5. The instruction referred to in the ninth assignment of error was not, as applied to the case before the jury, erroneous. The injury received at the time of the accident was the proximate cause of the paralysis, if it caused the disease in the course of which and as a result of which the paralysis followed. *Order affirmed.*

EARL, J., IN EHRGOTT v. MAYOR OF NEW YORK.

1884. 96 *New York*, 280, 281.

It is sometimes said that a party charged with a tort, or with breach of contract, is liable for such damages as may reasonably be supposed to have been in the contemplation of both parties at the time, or with such damage as may reasonably be expected to result, under ordinary circumstances, from the misconduct, or with such damages as ought to have been foreseen or expected in the light of the attending circumstances, or in the ordinary course of things. These various modes of stating the rule are all apt to be misleading, and in most cases are absolutely worthless as guides to the jury. *Leonard v. N. Y. &c., Tel. Co.*, 41 N. Y. 544. Parties when they make contracts usually contemplate their performance and not their breach, and the consequences of a breach are not usually in their minds, and it is useless to adopt a fiction in any case that they were. When a party commits a tort resulting in a personal injury, he cannot foresee or contemplate the consequences of his tortious act. He may knock a man down, and his stroke may, months after, end in paralysis or in death,—results which no one anticipated or could have foreseen. A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen, or the injuries which may be caused. Here, nothing short of Omniscience could have foreseen for a minute what the result and effect of driving into this ditch would be. Even for weeks and months after the accident the most expert physicians could not tell the extent of the injuries.

The true rule, broadly stated, is that a wrong-doer is liable for the damages which he causes by his misconduct. But this rule must be practicable and reasonable, and hence it has its limitations. A rule to be

of practicable value in the administration of the law, must be reasonably certain. It is impossible to trace any wrong to all its consequences. They may be connected together and involved in an infinite concatenation of circumstances. As said by Lord Bacon, in one of his maxims (Bac. Max. Reg. 1): "It were infinite for the law to judge the cause of causes, and their impulsion one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." The best statement of the rule is that a wrong-doer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469. We are, therefore, of opinion that the judge did not err in refusing to charge the jury that the defendant was liable "only for such damages as might reasonably be supposed to have been in the contemplation of the plaintiff and defendant as the probable result of the accident."

ETEN, PLAINTIFF AND RESPONDENT, v. LUYSTER, ET AL., DEFENDANTS AND APPELLANTS.

1875. 60 *New York*, 252.¹

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff, entered upon a verdict. Reported below, 5 *Jones & Spencer*, 486.

Action under Section 49 of the statute relative to summary proceedings to recover the possession of land. This section provides that, if the proceedings shall be reversed or quashed by the Supreme Court, the tenant or lessee may recover against the person making application for such removal, any damages he may have sustained by reason of such proceedings, with costs, in an action on the case.

In 1868, the defendants, owners of certain premises, commenced summary proceedings to recover possession, on the ground of an alleged holding over after the termination of a lease. The present plaintiff, who was occupying as an under-tenant, was made a party to this proceeding. The justice, before whom the application was brought, decided in favor of the applicants (the present defendants), and issued a warrant against all the parties in possession, including the plaintiff. By virtue thereof, defendants were put into possession, and, in the absence of plaintiff, they removed from the premises his personal

¹ The statement of facts has been rewritten. Only such parts of the original statement and of the opinion are given as relate to one point. The arguments are omitted. — ED.

property, and tore down and destroyed a building built by him upon the premises, one part of which had been used by him as a stable. The above proceedings for possession, originally brought before a justice, were subsequently taken by *certiorari* to the Supreme Court, where the judgment was reversed. The plaintiff then commenced the present action under the aforesaid provision of the statute.

Upon the trial, the plaintiff offered evidence tending to show that he kept in a tin box, inside a feed-box, in the stable, a sum of money amounting to about two thousand dollars; and that this money was lost in the removal of the building by the defendants. This evidence was received subject to objection.

The Court charged in substance, among other things: That, if the jury found that defendants acted in the matter under color of the summary proceedings, then they were liable in damages to the plaintiff, and the jury must consider to what extent the plaintiff has suffered from their act.

The defendants requested the Court to charge, that as a matter of law, the putting of a large sum of money in a feed-box, and leaving it there in that stable, was not such due care as the law requires a man to take of money to enable him to saddle the loss upon any party who has not taken the same. This was refused, and the defendants excepted.

The Court did charge on this subject: "It is for you [the jury] to consider all the circumstances of this case; and, in view of the testimony as to this man's position and habits, and his manner of conducting business, and, in the light of all the evidence before you, to pass upon the probability or improbability of an intelligent man in his condition keeping his money in this way. It is not for me to say that a man should have done so and so with his money. It is for you to judge whether he took such a course as a man in his class of life, in that kind of business, and with his opportunities for knowledge, would reasonably take under such circumstances. You are to be guided by the facts and circumstances in determining this question." And to this the defendants excepted.

Wm. Henry Arnoux, for appellants.

James Clark, for respondents.

ALLEN, J. . . . As landlords, the defendants had no right of entry, and their forcible dispossession of the plaintiff was a trespass for which the plaintiff had an action; and the proceedings for his removal by summary process, under the landlord and tenant act, having been reversed, the warrant furnished no protection to them, and constituted no defence to the action. 2 R. S., 516, § 49; *Hayden v. Florence Sewing Machine Co.*, 54 N. Y. 221. The statute expressly gives an action to the tenant in such case.

The plaintiff was only entitled to recover such damages as were the direct consequences of the acts of the defendants, and those acting under their direction and by their authority. This would exclude from

the consideration of the jury all damages resulting from the acts of, or want of proper care of the property by the plaintiff. The act complained of was the wrongful removal and destruction of the plaintiff's property in his absence, and there was no evidence that any part of the loss was caused by his act, or could have been prevented by him. The question of contributory negligence is not in the case. The plaintiff owed no duty to the defendants, and was not called upon to gather up the fragments of his scattered and broken chattels, but was at liberty to leave them where the defendants left them, and look to the latter for their value. They were out of his possession by the tortious act of the defendants, by whom, and whose acts, they were lost or destroyed. The plaintiff complains of the pulling down and destruction of his building, and the taking and conversion of his personal property, as well as the damages sustained by a loss of his business. The latter claim was excluded from the consideration of the jury by the Court, but evidence of the other items of loss and damage were clearly within the allegations of the complaint, and admissible. For all loss occasioned by the trespass, whether in the destruction of the chattels or the loss of money that was kept upon the premises, the plaintiff was entitled to recover. That the money was kept in an unusual place did not take it out of the protection of the law, or affect the liability of the defendants for their tort. They acted at their peril, and must respond for the consequences. The loss of the money, although the defendants may not have suspected its presence, was the direct and necessary consequence of the acts of the defendants.

[Other objections overruled.] *The judgment must be affirmed.*

All concur; RAPALLO, J., expresses no opinion as to the right of the plaintiff to recover for the money lost, but concurs in opinion in all other respects. *Judgment affirmed.*

THE QUEEN v. SAUNDERS AND ARCHER.

Warwick Assizes, 15 Elizabeth. 2 Plowden, 473.¹

It appears by the record that John Saunders, late of Greneborough, in the County of Warwick, husbandman, and Alexander Archer, late of Framton, in the said county, yeoman, were arraigned before the justices upon an indictment, for that the aforesaid John Saunders, the 20th day of September, in the 14th year of the reign of the present Queen, with force and arms, &c., at Greneborough, in the county aforesaid, being seduced by the instigation of the devil, feloniously gave and ministered to one Eleanor Saunders, his daughter, two pieces of a roasted apple mixed with poison, called arsenick and roseacre,

¹ The formal statement of the record is omitted. — Ed.

with an intent that she might die by the operation of the same poison ; which said Eleanor, after the receipt of the same pieces of apple so mixed with poison aforesaid into her body, languished of the poison and the operation thereof from the aforesaid 20th day of September, in the said 14th year, unto the 22d day of September then next following, on which said 22d day of September she died of the poison aforesaid : And that the aforesaid Alexander Archer, before the murder aforesaid by the said John Saunders in form aforesaid perpetrated, viz. the 16th day of September, in the said 14th year, at Greneborough aforesaid, feloniously procured and advised the said John Saunders to do and perpetrate the murder aforesaid, against the peace, &c. And upon their arraignment they pleaded not guilty, and a jury was empanelled to try them. And upon their examinations and the evidence given (as I was credibly informed, for I was not present, and therefore what I here report is upon the relation of the said justices of assize and of the clerk of assize) the truth of the matter appeared to the justices to be thus. The said John Saunders had a wife whom he intended to kill, in order that he might marry another woman with whom he was in love, and he opened his design to the said Alexander Archer, and desired his assistance and advice in the execution of it, who advised him to put an end to her life by poison. With this intent the said Archer bought the poison, viz. arsenick and roseacre, and delivered it to the said John Saunders to give it to his wife, who accordingly gave it to her, being sick, in a roasted apple, and she ate a small part of it, and gave the rest to the said Eleanor Saunders, an infant, about three years of age, who was the daughter of her and the said John Saunders, her husband. And the said John Saunders seeing it, blamed his wife for it, and said that apples were not good for such infants ; to which his wife replied that they were better for such infants than for herself : and the daughter eat the poisoned apple, and the said John Saunders, her father, saw her eat it, and did not offer to take it from her, lest he should be suspected, and afterwards the wife recovered, and the daughter died of the said poison.

And whether or no this was murder in John Saunders, the father, was somewhat doubted, for he had no intent to poison his daughter, nor had he any malice against her, but on the contrary he had a great affection for her, and he did not give her the poison, but his wife ignorantly gave it her ; and although he might have taken it from the daughter, and so have preserved her life, yet the not taking it from her did not make it felony, for it was all one whether he had been present or absent as to this point, inasmuch as he had no malice against the daughter, nor any inclination to do her any harm. But at last the said justices, upon consideration of the matters, and with the assent of Saunders, Chief Baron, who had the examination of the said John Saunders before, and who had signified his opinion to the said justices (as he afterwards said to me), were of opinion that the said offence was murder in the said John Saunders. And the reason

thereof (as the said justices and the chief baron told me) was because the said John Saunders gave the poison with an intent to kill a person, and in the giving of it he intended that death should follow. And when death followed from his act, although it happened in another person than her whose death he directly meditated, yet it shall be murder in him, for he was the original cause of the death, and if such death should not be punished in him, it would go unpunished; for here the wife, who gave the poisoned apple to her daughter, cannot be guilty of any offence, because she was ignorant of any poison contained in it, and she innocently gave it to the infant by way of necessary food, and therefore it is reasonable to adjudge her innocent in this case, and to charge the death of the infant, by which the Queen has lost a subject, upon him who was the cause of it, and who intended death in the act which occasioned the death here. But if a man prepares poison, and lays it in several parts of his house, with an intent to kill rats and such sort of vermin, and a person comes and eats it, and dies of it, this is not felony in him who prepared and laid it there, because he had no intent to kill any reasonable creature. But when he lays the poison with an intent to kill some reasonable creature, and another reasonable creature, whom he does not intend to kill, is poisoned by it, such death shall not be dispunishable, but he who prepared the poison shall be punished for it, because his intent was evil. And therefore it is every man's business to foresee what wrong or mischief may happen from that which he does with an ill intention, and it shall be no excuse for him to say that he intended to kill another, and not the person killed. For if a man of malice prepense shoots an arrow at another with an intent to kill him, and a person to whom he bore no malice is killed by it, this shall be murder in him, for when he shot the arrow he intended to kill, and inasmuch as he directed his instrument of death at one, and thereby has killed another, it shall be the same offence in him as if he had killed the person he aimed at, for the end of the act shall be construed by the beginning of it, and the last part shall taste of the first, and as the beginning of the act had malice prepense in it, and consequently imported murder, so the end of the act, viz. the killing of another, shall be in the same degree, and therefore it shall be murder, and not homicide only. For if one lies in wait in a certain place to kill a person, and another comes by the place, and he who lies in wait kills him out of mistake, thinking that he is the very person whom he waited for, this offence is murder in him, and not homicide only, for the killing was founded upon malice prepense. So in the principal case, when John Saunders of malice prepense gave to his wife the instrument of death, viz. the poisoned apple, and this upon a subsequent accident killed his daughter, whom he had no intention to kill, this is the same offence in him as if his act had met with the intended effect, and his intention in doing the act was to commit murder, wherefore the event of it shall be murder. And so the justices declared their opinions to the jurors, whereupon they found

both the prisoners guilty, and John Saunders had his judgment and was hanged. [Omitting the discussion as to the liability of Archer.]

NOTE BY REPORTER. *Collige ex hoc*, that if one maliciously intends to burn the house of A. only, and not the house of B., and yet in burning the house of A. the house of B. happens to be burnt, in this case the burning of the house of B. is felony, and the party may be indicted as having maliciously burnt it. 3 Inst. 67; N. P. C. 85; 1 H. H. P. C. 569; 1 Hawk. P. C. 106, f. 5.

HARRISON v. BERKLEY.

1847. 1 *Strobbart's Reports, Law (South Carolina)*, 525.¹

TRIED before Mr. Justice Wardlaw, at Kershaw, Spring Term, 1847.

The following is the report of the presiding judge:—

This was an action of trespass on the case, in which the plaintiff sought to recover damages, for that the defendant, being a shop-keeper, in violation of the statute on the subject, and to the wrong of the plaintiff, sold and delivered ardent spirits to Bob, a slave of the plaintiff, by means whereof the said slave became intoxicated, and died.

It appeared that on the 24th day of December, 1845, Bob, being patroon of one of the plaintiff's boats, on his way from Charleston went into the shop of defendant in Camden, and there received a gallon jug and a quart bottle of whiskey, and started with them in the afternoon, to convey to his master in Fairfield, across the Wateree, intelligence of the boat's arrival. Bob drank none at the shop, but drank repeatedly from the bottle before he reached the river, at the ferry, and afterwards; fell down in the road repeatedly; fell into a creek, in which he would have been drowned, but for the aid of some white men then in his company; and soon afterwards, at the fork of the roads, proceeded alone, staggering. He was clad in homespun, and had a bundle, besides the jug, on his back. The night was misty, and somewhat cold. He called at a house and got fire, returned and went again. Next morning he was found dead near the house where he had called; the jug of whiskey full and corked near him, the bottle not to be seen; and upon movement of his body, a fluid smelling like whiskey flowed from his mouth. A physician examined his body upon the inquest, but could discover no external injury; and from the want of rigidity in the muscles and other appearances, had no doubt that he died of drunkenness and exposure.

A witness for the plaintiff swore positively that he was present in the defendant's shop, and saw Bob hand his jug and bottle empty to the defendant, and receive them from the defendant full of whiskey, this conversation passing: Defendant to Bob, when he handed back

¹ The arguments are omitted. — Ed.

the jug, "Now, mind, old fellow, don't hurt yourself or me either." Bob, "No, sir, I won't hurt you or myself either. How much do I owe you?" Defendant, "Two dollars." Bob, "I'll pay you to-morrow when I come to unload the boat."

A brother of the defendant (as to whom eight witnesses testified against his credit, and four in favor of it), and one Shegog, who was acting as occasional assistant in the shop, testified that Bob applied to the defendant for liquor, but the defendant refused to let him have it. Eli Bass, a free negro (who was chief patroon of the fleet to which Bob's boat belonged), then took the jug and handed it to the defendant, who filled it and handed it back to Bass, who delivered it to Bob, there being no bottle then seen.

I submitted to the jury the question of fact, whether the defendant sold or delivered the liquor to Bob, saying, upon a proposition urged by the plaintiff, that if the sale was really made to Bass, the defendant was not answerable, although he may have suspected that Bass would deliver the liquor to Bob; but that if the defendant knew that Bass was employed as a mere instrument to enable Bob to make the purchase, such an artifice would place the defendant in no better situation than if the delivery had been direct to Bob.

The question mainly argued was as to the liability of the defendant for the death of the negro, said to be a consequence of his wrongful act.

I held, that for truly proximate consequences, which, in the ordinary course of nature, do actually result from a wrongful act, even where there is no wicked intention, recovery to the extent of the actual loss may be had, although the consequences may be such as are neither necessary nor easy to be foreseen.

That where there was fraud, malice, gross negligence, or active evil intention, consequences less truly proximate may be regarded, and damages be carried beyond the actual loss.

That in a case where no aggravation from evil motive arose (and such I thought this case), natural consequences not immediately proximate would be considered, if they were probable; but either those consequences called remote, or those less proximate consequences which were improbable, would be disregarded.

Assuming then, that there was in this case no aggravation from evil motive, and that the injurious consequences were not immediately proximate, I left it to the jury (if they should find that the defendant had been guilty of the wrongful act of selling or delivering liquor to a slave) to decide whether the drinking, intoxication, exposure, and death of the slave, were the natural and probable consequences of that wrongful act,—holding that if so, the defendant was answerable for the value of the slave.

I endeavored by various instances to illustrate the meaning of the terms I used, and to explain the difference between damages actual and speculative, proximate and remote, probable and contingent, natural and extraordinary; and difficult as it was, by instances, to show

these diversities, I find it much more difficult by any general terms to give precision to the propositions I laid down.

The jury found for the plaintiff six hundred and fifty dollars; and the defendant appeals on the grounds annexed.

The defendant gives notice that he will move the Court of Appeals for a nonsuit in this case, on the ground that the declaration and proof made no sufficient cause of action in law. That the injury was too remote. Failing in this, then for a new trial.

1. Because his Honor charged the jury, that if the defendant knew that the whiskey was intended for Bob, when he delivered it to Bass, he is as liable as if he had delivered it to Bob.

2. Because his Honor charged the jury, that if the natural and probable consequence of giving the liquor to Bob was that he would drink, the defendant is liable for his value, if he died.

3. Because Bob did not die from the effect of the liquor alone, but from the combined effect of the liquor and exposure, for the latter of which the defendant is not liable, and therefore not liable at all.

4. Because the damage was too remote from the injury, and not a necessary, natural, or probable consequence of the wrong.

5. Because the verdict is clearly against the evidence.

J. M. DeSaussure, for the motion.

Smart and Gregg, *contra*.

WARDLAW, J., delivered the opinion of the Court.

This action is novel in the instance, but that is no objection to it if it be not new in principle. The law endures no injury from which damage has ensued without some remedy; but directs the application of principles already established to every new combination of circumstances that may be presented for decision.

It has, however, been urged here again, as it was on the circuit, that admitting everything which the plaintiff has alleged, he has presented either a case of damage without legal injury, or a case of injury without legal damage.

First. Damage without injury. It is said, that the act of selling or giving whiskey to the slave, Bob, was not in itself a wrong to the plaintiff, but was only a violation of a penal statute, which has imposed upon such acts penalties, to be recovered by indictment; and that, therefore, no action by the plaintiff lies, nor any remedy but the indictment prescribed by the statute.

The wrong, for which an action of trespass on the case lies, may be either an unlawful act, or a lawful act done under circumstances which render it wrongful,—any act done or omitted, contrary to the general obligation of the law, or the particular rights and duties of the parties. It might not be difficult to distinguish between the selling or giving of spirituous liquor to a slave, and the fair selling to a slave of an article which could not be expected to produce harm; and to show that, independent of any express statutory prohibition, the former act is so contrary to the rights of the master, and to the duties imposed

upon other persons in a slave-holding community, that the person who does it without special matter of excuse subjects himself to liability for all the legal damage that may thence ensue; in like manner, as if he had carelessly or wantonly placed noxious food within the reach of domestic animals. But this case may be rested where the plaintiff left it. Our statutes, time after time, have subjected him who sells to a slave any article without license, to fine and imprisonment upon his conviction after indictment; and the last statute on the subject provides especially for the punishment, upon conviction after indictment, of him who sells or gives spirituous liquor to a slave. No express prohibition is contained in either of the statutes, but the penalties necessarily imply a prohibition, and make the thing prohibited unlawful. 10 Co. 75. For the injury to the public, the only remedy is that provided by the statute,—indictment; but, as in case of a nuisance to the whole community, if any person has suffered a particular damage beyond that suffered by the public, he may maintain an action in respect thereof, 2 *Ld. Ray.* 985; so in case of a misdemeanor punishable by statute, a party grieved is entitled to his action for the particular damage done to him by reason of the unlawful act.

Second. We come then to the main ground assumed in the defence,—that no legal damage followed the injury, but that which was shown was too remote,—not such a consequence of the injury as the law will notice.

It would be vain to attempt to define with precision the terms which have been used on this subject, or to lay down any general rules by which consequences that shall be answered for, and those which are too remote for consideration, may be always distinguished. But we will endeavor, without dwelling on particular cases, to deduce from the general course of decision on this point, so much as may show that the instructions given were sufficiently favorable for the defendant, and that verdict is conformable to law.

We are troubled here with no distinctions between loss sustained and gain prevented; nor with any between cases which have been aggravated by evil motive, and those which have not been: for the plaintiff here has claimed only compensation for his actual loss; and the defendant may be regarded as the jury were instructed to regard him,—that is, as one who, with no particular evil purpose, or ill-will towards master or slave, has violated the law only for his own gain.

A distinction, however, is to be observed between cases where the damage ensues whilst the injurious act is continued in operation and force, and those where the damage follows after the act has ceased. In the former class, were the cases of *Wright & Gray*, 2 Bay, 464, and all the cases which have been cited, or supposed, of slaves put without permission of the owners on race-horses, in steamboats, or on railroads; those of property injured during a deviation from the course which was prescribed concerning it, 6 Bing. 716; and in general all,

where unexpected damage was done whilst an unauthorized interference with another's rights lasted. Here it is usually of small moment to inquire, whether the damage was the natural consequence of the injury, because the immediate connection between the wrongful act and the damage sustained shows that the damage, however extraordinary, has actually resulted directly from the injury. But in the latter class, to which the case before us must be assigned, the connection is not immediate between the injury and the consequences; and it becomes indispensable to discriminate in some way between the various consequences that in some sense may be said to proceed from the act, for all of them cannot constitute legal damage.

Every incident will, when carefully examined, be found to be the result of combined causes, and to be itself one of various causes which produce other events. Accident or design may disturb the ordinary action of causes, and produce unlooked for results. It is easy to imagine some act of trivial misconduct or slight negligence, which shall do no direct harm, but set in motion some second agent that shall move a third, and so on, until the most disastrous consequences shall ensue. The first wrong-doer, unfortunate rather than seriously blamable, cannot be made answerable for all of these consequences. He shall not answer for those which the party grieved has contributed by his own blamable negligence or wrong to produce, or for any which such party, by proper diligence, might have prevented. *Com. Dig. Action on the Case*, 134; 11 *East*, 60; 2 *Taunt.* 314; 7 *Pick.* 284. But this is a very insufficient restriction; outside of it would often be found a long chain of consequence upon consequence. Only the proximate consequence shall be answered for. 2 *Greenleaf Ev.* 210, and cases there cited. The difficulty is to determine what shall come within this designation. The next consequence only is not meant, whether we intend thereby the direct and immediate result of the injurious act, or the first consequence of that result. What either of these would be pronounced to be would often depend upon the power of the microscope with which we should regard the affair. Various cases show that in search of the proximate consequences the chain has been followed for a considerable distance, but not without limit, or to a remote point. 8 *Taunt.* 535; *Peake's Cases*, 205. Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequence, or may be traced in those causes. To a sound judgment must be left each particular case. The connection is usually enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequence than the first injurious act. 8 *East*, 1; 1 *Esp.* 48. It is, therefore, required that the consequences to be answered for should be natural as well as proximate. 7 *Bing.* 211; 5 *B. & Ad.* 645. By this, I under-

stand, not that they should be such as upon a calculation of chances would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from. In requiring concurring consequences, that they should be proximate and natural to constitute legal damage, it seems that in proportion as one quality is strong, may the other be dispensed with: that which is immediate cannot be considered unnatural; that which is reasonably to be expected will be regarded, although it may be considerably removed. 20 Wend. 223.

It has been supposed, in argument, that without any of these distinctions, it is always sufficient to inquire only, whether the consequences have certainly proceeded from the injurious act; but it will be seen that in settling what have certainly proceeded from the act, we will be obliged to determine what are natural and proximate, unless we mean to run to absurd extremes.

In the case before us, the defendant has insisted that the damage resulted not so much from his act, as from the acts of the slave, who was a moral being, and a free agent. 4 M'Cord, 223. In cases where damage has been done during the continuance of a wrongful interference with a slave, it was considered of no consequence that the slave was a free agent, 2 Rich. 613; *Id.* 455; 9 La. Rep. 213; for there the consent of the slave could not justify the interference, and even the wilful act of the slave producing the damage was like any other improbable misfortune, which might have occurred, whilst the wrongful act was in operation. But in cases like this, the will of a slave may well interrupt the natural consequences of a wrong-doer's act, and produce consequences for which he should not answer. Selling whiskey to a slave is no more unlawful than selling to a slave any other article, without license. And if a rope, sold to a slave, without license and without suspicion of mischief, should be employed by the slave to hang himself, the prominent ground of distinction between that case and the present one would depend upon the will of the slave. If it should be said that the slave would have got a rope elsewhere, or would have taken some other means of self-destruction, it might be answered that if this defendant had not sold the whiskey, Bob would have got it, or some other means of intoxication, elsewhere. But where the mischievous purpose of a slave is manifest, or should be foreseen by ordinary prudence, the injurious act embraces the will of the slave as one of its ingredients; the wrong consists, in part, in ministering to the purpose; and natural consequences of that purpose (although the purpose may have been carried to an extent not anticipated, or the consequences may have been altogether undesigned and unusual) are the legal consequences of the injurious act. Therefore, it was well left to the jury to decide whether the drinking and intoxi-

cation of Bob were the natural and probable consequences of selling liquor to him. If fault be found with the instructions given on this head, it is that they were too favorable to the defendant, in requiring that the consequences should be found to be probable as well as natural. For proximate and natural consequences, not controlled by the unforeseen agency of a moral being, capable of discretion, and left free to choose, or by some unconnected cause of greater influence, a wrong-doer must generally answer, however small was the probability of their occurrence. In many instances the will of a slave, as a controlling cause, would be found as feeble as was the will of a child that received damage from a cart left carelessly in the street, which he unlawfully attempted to drive. 1 Adol. & El. n. s. 28. Often the intervention of a third person's will,* influenced by the injurious act, has no effect in rendering consequences too remote. 1 Adol. & El. 43; 2 C. Mee. & Rosc. 707.

The defendant, however, has further insisted, that if the drinking and intoxication were the proximate and natural consequences of his act, the exposure and death were not; but that the death resulted mainly from the exposure, and not from the intoxication only. It may well be said (speaking in the language of everyday life, which attempts no philosophical analysis) that the exposure was the immediate effect of the intoxication, and that the two produced the death. Thus, without any unconnected influence to be perceived, the death has come from the intoxication which the defendant's act occasioned. The defendant cannot complain that an agent which his own act naturally brought into operation has occurred to produce the result. The proximity in order of events, and intimacy of relation as cause and effect, between the injurious act and the damage, are as great here as in various cases which have been cited. 17 Pick. 78; 3 Scott, New R. 386; 17 Wend. 71; 9 Wend. 325; 11 East, 571; and the cases before cited.

The jury have decided the facts, and this Court is of opinion that under the inferences which must be drawn from the finding, the verdict is free from the objection that the damages were too remote.

The instructions concerning a delivery to Bass, as an instrument of Bob, are approved.

The motion is dismissed.

Withers, J., having been of Counsel in this cause, gave no opinion.

SALISBURY v. HERCHENRODER.

1871. 106 Mass. 458.¹

TORT for injuries done to a building owned and occupied by the plaintiffs on the north side of Avon Street in Boston. The defendant was lessee and occupant of an adjoining building on the same street, and suspended what was called a banner-sign, bearing his name upon the banner, across the street, upon a wire rope, one end of which was fastened by an iron bolt to his building, and the other end in like manner to a building on the south side of the street. The sign was made of net-work for the purpose of diminishing its resistance of the wind, and due care was used in its construction and fastening. The lowest part of it was at least twenty feet above the pavement of the street; and it did not interfere with the ordinary enjoyment of the neighboring estates; but it was hung there in violation of an ordinance of the city of Boston, which rendered the defendant liable to a penalty for each day during which it remained suspended. On September 8, 1869, in what was commonly known as the "great gale" of that year, which was a gale of extraordinary violence, the wind blew the sign away, and the movement of the sign, which remained attached to the rope, jerked the iron bolt out of the building on the south side of the street, and hurled it across the street and through the glass of a window in the plaintiffs' building, thus doing the injuries for which they sought to recover. The plaintiffs' window was properly constructed, and they were in no way chargeable with negligence.

The parties stated the foregoing case for the judgment of the Superior Court, which ordered judgment for the defendant, and the plaintiffs appealed.

J. P. Treadwell, for plaintiffs.

R. Stone, Jr., for defendant. . . .

Even if the defendant violated the city ordinance relating to the projection of signs over streets, he is not liable in this action unless that violation of the law caused the injuries to the plaintiffs' property. The relation of cause and effect must exist between his act and their loss. The case is analogous to the cases against railroad corporations in which it is held that their failure to comply with statutes requiring them to station a flagman at the crossing of a highway, or blow a whistle or ring a bell, is not conclusive evidence of negligence, unless it produced the injury. *Wakefield v. Connecticut & Passumpsic Rivers Railroad Co.*, 37 Vt. 330; *Steves v. Oswego & Syracuse Railroad Co.*, 18 N. Y. 422, 425; *Brooks v. Buffalo & Niagara Falls Railroad Co.*, 25 Barb. 600; *Dascomb v. Buffalo & State Line Railroad Co.*, 27 Barb. 221. The defendant's violation of the ordinance was not in any

¹ The citations of plaintiffs' counsel, and parts of the argument for defendant, are omitted. — ED.

legal sense the cause of the injuries to the plaintiffs. They were the result of inevitable accident.

CHAPMAN, C. J. If the defendant's sign had been rightfully placed where it was, the question would have been presented whether he had used reasonable care in securing it. If he had done so, the injury would have been caused, without his fault, by the extraordinary and unusual gale of wind which hurled it across the street and against the plaintiffs' window. The party injured has no remedy for an injury of this character, because it is produced by the *vis major*. For example, a chimney or roof, properly constructed and secured with reasonable care, may be blown off by an extraordinary gale, and injure a neighboring building; but this is no ground of action.

But the defendant's sign was suspended over the street in violation of a public ordinance of the city of Boston, by which he was subject to a penalty. Laws & Ordinances of Boston (ed. 1863), 712. He placed and kept it there illegally, and this illegal act of his has contributed to the plaintiffs' injury. The gale would not of itself have caused the injury, if the defendant had not wrongfully placed this substance in its way.

It is contended that the act of the defendant was a remote, and not a proximate cause of the injury. But it cannot be regarded as less proximate than if the defendant had placed the sign there while the gale was blowing; for he kept it there till it was blown away. In this respect it is like the case of *Dickinson v. Boyle*, 17 Pick. 78. The defendant had wrongfully placed a dam across a stream on the plaintiff's land, and allowed it to remain there; and a freshet came and swept it away; and the defendant was held liable for the consequential damage. It is also, in this respect, like the placing of a spout, by means of which the rain that subsequently falls is carried upon the plaintiff's land. The act of placing the spout does not alone cause the injury. The action of the water must intervene, and this may be a considerable time afterwards. Yet the placing of the spout is regarded as the proximate cause. So the force of gravitation brings down a heavy substance, yet a person who carelessly places a heavy substance where this force will bring it upon another's head does the act which proximately causes the injury produced by it. The fact that a natural cause contributes to produce an injury, which could not have happened without the unlawful act of the defendant, does not make the act so remote as to excuse him. The case of *Dickinson v. Boyle* rests upon this principle. See also *Woodward v. Aborn*, 35 Maine, 271, where the defendant wrongfully placed a deleterious substance near the plaintiffs' well, and an extraordinary freshet caused it to spoil the water; also *Barnard v. Poor*, 21 Pick. 378, where the plaintiffs' property was consumed by a fire carelessly set by the defendant on an adjoining lot; also *Pittsburgh City v. Grier*, 22 Penn. State, 54; *Scott v. Hunter*, 46 Penn. State, 192; *Polack v. Pioche*, 35 Cal. 416, 423.

Judgment for the plaintiffs affirmed.

WILEY v. WEST JERSEY RAILROAD COMPANY.

1882. 44 *New Jersey Law Reports*, 247.¹

ON rule to show cause.

Argued at February Term, 1882, before BEASLEY, Chief-Justice, and Justices DIXON, REED, and MAGIE.

For the rule, *P. L. Voorhees*.

Contra, *Mr. Richards*, of New York.

DIXON, J. This suit was brought to recover damages for the destruction of growing wood by fire alleged to have been communicated from an engine of the defendant. The plaintiff having obtained a verdict for \$1260, the defendant seeks a new trial.

. . . The plaintiff's evidence was to the effect that on May 3, 1880, at half-past seven o'clock, A. M., a train of the defendant passed Mount Pleasant Station, going northwesterly, at about forty miles an hour; that five minutes afterwards another train of the defendant stopped at that station and then proceeded northwesterly; that the wind was then blowing moderately from the west, and that the ground was covered with dry leaves, and the herbage was dry; that in a few minutes after the last train left, fire was discovered about one hundred and fifty feet east of the track and eight hundred feet northwest of the station; that the defendant's station-agent and others spent an hour in putting it out, and thought they had succeeded; that about ten o'clock the wind freshened and continued to grow stronger until noon; that at eleven o'clock another train came from the northwest to the station, and within a few minutes thereafter flame was again seen at the easterly margin of the former fire, some three hundred and fifty feet east of the track, on the border of a wood. This fire, in spite of efforts to extinguish it, burned through continuous woods over some three hundred acres of the plaintiff's woodland, which lay about a mile from the station.

The next ground taken is that the burning of the plaintiff's woods was not the proximate effect of the defendant's negligence. On this point the defendant urges that the second fire must have been but a fresh outbreak of the first; that this having been called to the attention of the tenant of the land on which it started, it was his duty to extinguish it if possible, and his failure to do so was negligence; that this negligence, having intervened between the defendant's negligence and the plaintiff's injury, broke the causal connection between them, and so relieved the defendant. The defect in this contention lies in the suggestion that the mere failure of a third person to extinguish the

¹ Only so much of the opinion is given as relates to one point. — Ed.

fire could be regarded as severing the train of causation between the defendant's fault and the injury. The rule of law requires that the damages chargeable to a wrong-doer must be shown to be the natural and proximate effects of his delinquency. The term "natural" imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things; the term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss. *Cuff v. Newark & N. Y. R. R. Co.*, 6 Vroom, 17; *D., L. & W. R. R. Co. v. Salmon*, 10 Vroom, 299. Now, the spread of the fire was a natural result of its kindling, and the failure to extinguish it was not, in any just sense, an efficient cause of its spreading; it was merely the absence of prevention. Although that failure might be culpable, yet it neither added to the original force nor gave it new direction, and hence, in tracing back the line of causation, it would not be noticed as a potent agency. The nearest culpable cause was the escape of the spark from the engine. Hence on this point the defendant has not been injured.

Let the rule to show cause be discharged with costs.

ALEXANDER v. TOWN OF NEW CASTLE.

1888. 115 *Indiana*, 51.

FROM the Henry Circuit Court.

J. M. Brown, R. Warner, C. S. Hernly, and S. H. Brown, for appellant.

J. Brown, and W. A. Brown, for appellee.

NIBLACK, C. J. This was an action brought by Harvey W. Alexander against the town of New Castle, for injuries alleged to have resulted from negligently permitting a sidewalk to be out of repair.

The first paragraph of the complaint charged that the town allowed a pit to be dug, or an excavation to be made, in the side of one of its streets, and wrongfully and negligently suffered and permitted such pit or excavation, with full knowledge of its dangerous character, to remain open and uninclosed, whereby the plaintiff, without any fault on his part, fell into the same and was injured.

The second, and only other paragraph, contained some additional averments not material to any question involved in this appeal.

The town answered: First. In denial. Second.¹ That the plaintiff, as a special constable, was proceeding, under the sentence of a justice of the peace, to commit one Heavenridge to jail; and, in doing so, attempted to pass the pit or excavation in question; that, when

¹ The second answer is abridged. — ED.

opposite the same, Heavenridge seized the plaintiff and threw him into the pit, whereby plaintiff was hurt and Heavenridge escaped from plaintiff's custody.

A demurrer to this second paragraph of answer, for the alleged insufficiency of its facts as a defence, was overruled, and a trial terminated in a verdict and judgment for the town, the defendant below.

Complaint is first made of the overruling the demurrer to the second paragraph of the answer, and this complaint is based upon the claim that, as the pit or excavation so wrongfully and negligently permitted to remain open and uninclosed afforded Heavenridge the opportunity of throwing the plaintiff into it as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received.

However negligent a person, or a corporation, may have been in some particular respect, he, or it, is only liable to those who may have been injured by reason of such negligence, and the negligence must have been the proximate cause of the injury sued for.

Where some independent agency has intervened and been the immediate cause of the injury, the party guilty of negligence in the first instance is not responsible. On that subject Wharton, in his work on the Law of Negligence, at section 134, says: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative."

So, if a house has been negligently set on fire, and the fire has spread beyond its natural limits by means of a new agency; for example, if a high wind arose after its ignition, and carried burning brands to a great distance, thus causing a fire and a loss of property at a place which would have been safe but for the wind, the loss so caused by the wind will be set down as a remote consequence, for which the person setting the fire should not be held responsible. 1 Thompson, Negligence, 144.

Our cases are in harmony with the general principles herein announced. *Smith v. Thomas*, 23 Ind. 69; *Pennsylvania Co. v. Hensil*,

70 Ind. 569 (36 Am. R. 188); *City of Greencastle v. Martin*, 74 Ind. 449 (39 Am. R. 93); *Billman v. Indianapolis, &c. R. R. Co.*, 76 Ind. 166 (40 Am. R. 230); *City of Crawfordsville v. Smith*, 79 Ind. 308 (41 Am. R. 612); *Terre Haute, &c. R. R. Co. v. Buck*, 96 Ind. 346 (49 Am. R. 168); *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478 (49 Am. R. 469); *Pennsylvania Co. v. Whitlock*, 99 Ind. 16 (50 Am. R. 71).

Heavenridge was clearly an intervening, as well as an independent, human agency in the infliction of the injuries of which the plaintiff complained. The Circuit Court, consequently, did not err in overruling the demurrer to the second paragraph of the answer.

[Other objections considered and overruled.]

Judgment affirmed.

VICARS v. WILCOCKS.

47 George III. 8 East, 1.

IN an action on the case for slander, the plaintiff declared, that whereas he was retained and employed by one J. O., as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by J. O. and others that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of J. O., and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one J. M. concerning the plaintiff, and concerning certain flocking-cord of the defendant, alleged to have been before then cut, said that he (the defendant) had last night some flocking-cord cut into six yard lengths, but he knew who did it: for it was William Vicars; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse with other third persons, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard. By reason whereof the said J. O., believing the plaintiff to have been guilty of unlawfully cutting the said flocking-cord, &c., discharged him from his service and employment, and has always since refused to employ him; and also one R. P., to whom the plaintiff applied to be employed, after his discharge from J. O., on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and is still out of employ and damnified, &c.

It appeared at the trial, before Lawrence, J., at Stafford, that the plaintiff had been retained by J. O., as a journeyman, for a year, at certain wages, and that before the expiration of the year his master had discharged him, in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to R. P. for employment, who re-

fused to employ him, in consequence of the words, and because his former master had discharged him for the offence imputed to him. The plaintiff was thereupon nonsuited, it being admitted that the words in themselves were not actionable, without special damage, and the learned judge being of opinion, that the plaintiff having been retained by his master, under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff; that the supposed special damage was the loss of those advantages which the plaintiff was entitled to under his contract with his master, which he could not in law be considered as having lost, as he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. 2dly. With respect to the subsequent refusal of R. P. to employ the plaintiff, that it did not appear to be merely on account of the words spoken, but rather on account of his former master having discharged him in consequence of the accusation, without which he might not have regarded the words.

Jervis now moved to set aside the nonsuit, and urged that it was always deemed sufficient proof of special damage in these cases, to show that the injury arose, in fact, from the slander of the defendant, and it was not less a consequence of it because the act so induced was wrongful on the part of the master. He said that he could find no case where such a distinction was laid down, and that the practice of *Nisi Prius* was understood to be otherwise. 2dly. That the refusal of R. P. to employ the plaintiff was clear of that objection; and that such refusal had proceeded upon the alleged cause of discharge by the first master, and not upon the bare act itself of discharge.

LORD ELLENBOROUGH, C. J., said that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence, a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond, by way of punishment for his supposed transgression. And his lordship asked, whether any case could be mentioned of an action of this sort, sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, *non liquet* that the refusal by R. P. to employ the plaintiff was in consequence of the words spoken, as it is alleged to be; there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ, which was more likely to weigh with R. P. than the mere words themselves of the defendant.

The other judges concurring,

Rule refused.

LYNCH, PLAINTIFF IN ERROR, v. KNIGHT AND WIFE,
DEFENDANTS IN ERROR.

1861. 9 *House of Lords Cases*, 577.¹

ERROR to the Irish Exchequer Chamber.

Mrs. Knight (her husband being joined for conformity as a plaintiff) brought an action to recover damages from Lynch for slander uttered by him to her husband, imputing to her that she had been almost seduced by Casserly before her marriage. The ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house and return to her father, whereby she lost the *consortium* of her husband.

The majority of the Law Lords *held* that the alleged ground of special damage was insufficient; the conduct of the husband not being (in their opinion) a natural and reasonable consequence of the slander.

LORD WENSLEYDALE, who *held*, on another ground, that the action would not lie, differed from the other Lords as to the special damage. On that point his opinion was as follows:—

This view of the case makes it unnecessary to consider whether the slander of the defendant has been proved to be the cause of the loss—the desertion by the husband—so as to make the words actionable, they not being so unless they have caused a special damage. Upon this question I am much influenced by the able reasoning of Mr. Justice Christian. I strongly incline to agree with him, that to make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow.

I agree with the learned judges, that the husband was not justified in sending his wife away. I think he is to blame; but I think that such deliberate and continued accusations, of such a character, coming from such a quarter, might reasonably be expected so to operate, and to produce the result which they did.

In the case of *Vicars v. Wilcocks*, 8 East, 1, I must say that the rules laid down by Lord Ellenborough are too restricted. That which I have taken from Mr. Justice Christian seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words, if true. Lord Ellenborough puts as an absurd case, that a plaintiff could recover damages for being thrown into

¹ The statement of facts has been much abridged. The arguments and most of the opinions are omitted. Only so much of the case is given as relates to the point in the extract from Lord Wensleydale's opinion. — Ed.

a horsepond, as a consequence of words spoken ; but I own I can conceive that when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and a compensation might be given for an act occurring as a consequence of an accusation of that crime.

Judgment reversed.

BINFORD v. JOHNSTON.

1882. 82 *Indiana*, 426.¹

FROM the Montgomery Circuit Court.

Action to recover damages for death of plaintiff's minor son. Plaintiff had judgment in Circuit Court.

M. W. Bruner, for appellant.

J. E. Humphries, for appellee.

ELLIOTT, J. The case made by the appellee's complaint, briefly stated, is this: Two sons of appellee, Allen and Todd, aged twelve and ten years respectively, bought of the appellant, a dealer in such articles, pistol cartridges loaded with powder and ball. The boys purchased the cartridges for use in a toy pistol, and were instructed by appellant how to make use of them in this pistol; the appellant knew the dangerous character of the cartridges, knew the hazard of using them as the boys proposed, and that the lads were unfit to be intrusted with articles of such a character; shortly after the sale, the toy pistol, loaded with one of the cartridges, was left by Allen and Todd lying on the floor of their home. It was picked up by their brother Bertie, who was six years of age, and discharged, the ball striking Todd and inflicting a wound from which he died.

A man who places in the hands of a child an article of a dangerous character and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong. If a dealer should sell to a child dynamite, or other explosives of a similar character, nobody would doubt that he had committed a wrong for which he should answer, in case injury resulted. So, if a druggist should sell to a child a deadly drug, likely to cause harm to the child or injury to others, he would certainly be liable to an action.

The more difficult question is whether the result is so remote from the original wrong as to bring the case within the operation of the maxim *causa proxima, et non remota, spectatur*. It is not easy to assign limits to this rule, nor to lay down any general test which will enable courts to determine when a case is within or without the rule. It is

¹ Part of the case is omitted. — ED.

true that general formulas have been frequently stated, but these have carried us but little, if any, beyond the meaning conveyed by the words of the maxim itself.

The fact that some agency intervenes between the original wrong and the injury does not necessarily bring the case within the rule; on the contrary, it is firmly settled that the intervention of a third person or of other and new direct causes does not preclude a recovery if the injury was the natural or probable result of the original wrong. *Billman v. Indianapolis, &c., R. R. Co.*, 76 Ind. 166 (40 Am. R. 230). This doctrine remounts to the famous case of *Scott v. Shepherd*, 2 W. Black. 892, commonly known as the "Squib case." The rule goes so far as to hold that the original wrong-doer is responsible, even though the agency of a second wrong-doer intervened. This doctrine is enforced with great power by Cockburn, C. J., in *Clark v. Chambers*, 7 Cent. L. J. 11; and is approved by the text-writers. Cooley, Torts, 70; Addison, Torts, section 12.

Although the act of the lad Bertie intervened between the original wrong and the injury, we cannot deny a recovery if we find that the injury was the natural or probable result of appellant's original wrong. In *Henry v. Southern Pacific R. R. Co.*, 50 Cal. 176, it was said: "A long series of judicial decisions has defined proximate, or immediate and direct damages to be the ordinary and natural results of the negligence; such as are usual, and as therefore might have been expected." Lord Ellenborough said in *Townsend v. Wathen*, 9 East, 277, that "Every man must be taken to contemplate the probable consequences of the act he does." In *Billman v. Indianapolis, &c., R. R. Co.*, *supra*, very many cases are cited declaring and enforcing this doctrine, and we deem it unnecessary to here repeat the citations. Under the rule declared in the cases referred to, it is clear that one who sells dangerous explosives to a child, knowing that they are to be used in such a manner as to put in jeopardy the lives of others, must be taken to contemplate the probable consequences of his wrongful act. It is a probable consequence of such a sale as that charged against appellant, that the explosives may be so used by children, among whom it is natural to expect that they will be taken, as to injure the buyers or their associates. A strong illustration of the principle here affirmed is afforded by the case of *Dixon v. Bell*, 5 M. & S. 198. In that case the defendant sent a child for a loaded gun, desiring that the person who was to deliver it should take out the priming. This was done; but the gun was discharged by the imprudent act of the child, the plaintiff injured, and it was held that the defendant was liable. In *Lynch v. Nurdin*, 1 Q. B. 29, the doctrine of the case cited was approved, and the same judgment has been pronounced upon it by other courts as well as by the text-writers. *Carter v. Towne*, 98 Mass. 567; *Wharton*, Neg. 851; *Shearman & Redf.* Neg. 3d ed., 596.

There is no such contributory negligence disclosed as will defeat a recovery. The age of the lads who bought the cartridges, the use the

appellant knew they intended to make of them, and the fact that they did use them as instructed by him, are all important matters for consideration upon the question of contributory negligence. There are very many cases holding that the age of the child is always to be taken into account, and that what would be negligence in an adult will not be negligence in a young lad. The Supreme Court of the United States thus states the rule: "The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." *Railroad Co. v. Stout*, 17 Wall. 657. It must be the law, in cases of this nature, that the age of the child shall be considered, or it must follow that a vendor of the most dangerous explosives may sell them as freely to young children as to men of mature years, and this surely would be a result which no reasonable man would undertake to support. In *Potter v. Faulkner*, 1 Best & S. 800, Erle, C. J., said: "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons;" and we think it may with equal truth be said that the common law both of England and America requires of him who deals with dangerous explosives to refrain from placing them in the hands of children of tender age. If the child is too young to know the character of the thing sold him, it is the business of the dealer to refuse to sell him articles likely to put in jeopardy his own or some other person's life. Where one sells another a dangerous instrument, and that other is ignorant of its true character, and this the seller knows, he is responsible for injuries resulting from the negligent use of the instrument. There are many well-reasoned cases which, carrying the doctrine still further, hold that one who places a dangerous thing in a position where it is likely to cause injuries to others, is liable to a child who is injured, although he may be a trespasser. *Bird v. Holbrook*, 4 Bing. 628; *State v. Moore*, 31 Conn. 479; *Birge v. Gardner*, 19 Conn. 507; *Lynch v. Nurdin*, *supra*; *Kerr v. Forgue*, 54 Ill. 482; *Keffe v. Milwaukee, &c. R. W. Co.*, 21 Minn. 207 (18 Am. R. 393); *Railroad Co. v. Stout*, *supra*. The case in judgment does not require us to carry the rule to the extent to which it is carried in the cases cited. Here, the appellant, with full knowledge of the character of the cartridges, and fully informed as to the use the lads intended to make of them, placed these dangerous instruments in their hands, and he cannot now escape liability, upon the ground that the boys had no right to buy or use such articles. Nor can he escape upon the ground that the loaded pistol was left lying where the young child, Bertie, could reach it. One who deals with children must anticipate the ordinary behavior of children. The appellant was bound to take notice of the natural conduct of lads like those to whom he sold the cartridges, and it cannot be justly said that the act of the lads in carrying the pistol with them to their home, and leaving it upon the floor within reach of their brother and playmate, was an unnatural or improbable one.

[Part of opinion omitted.]

Additional strength is added to one, at least, of the paragraphs of the complaint by the facts stated in it, showing that the cartridges were sold in violation of an express statute of the State. By an act passed in 1875, and incorporated in the Revision of 1881 as section 1986, it is made a misdemeanor to "sell, barter, or give to any other person under the age of twenty-one years any cartridges manufactured and designed for use in a pistol." In placing the cartridges in the hands of the lads, Allen and Todd, the appellant did an unlawful act, and under settled principles is liable for the consequences naturally and proximately resulting from his unlawful act. In *Weick v. Lander*, 75 Ill. 93, it is held that, "where an act unlawful in itself is done, from which an injury may reasonably and naturally be expected to result, the injury, when it occurs, will be traced back and visited upon the original wrong-doer." In the course of the opinion and as a commentary upon cases reviewed, it is said: "The principle announced is, that whoever does an unlawful act is to be regarded as the doer of all that follows." The decision in the case cited is well sustained; it finds support from the cases heretofore cited as well as from the following and many others: *Greenland v. Chaplin*, 5 Exch. 243; *Powell v. Deveney*, 3 Cush. 300; *Sheridan v. Brooklyn, &c. R. R. Co.*, 36 N. Y. 39; *Griggs v. Fleckenstein*, 14 Minn. 81; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Farrant v. Barnes*, 11 C. B. (N. S.) 553.

[Remainder of opinion omitted.]

Judgment affirmed.

CARTER v. TOWNE.

1870. 103 *Massachusetts*, 507.

TORT for carelessly and unlawfully selling to the plaintiff, a child eight years old, two pounds of gunpowder, which the plaintiff fired off and was thereby injured. After this Court had overruled the demurrer to the declaration, as reported 98 Mass. 567, the defendants filed an answer, denying each and every allegation in the declaration, and alleging that, if the sale was made to the plaintiff, it was made with the knowledge and assent of the plaintiff's father.

At the trial in the Superior Court, before Putnam, J., the plaintiff testified that he became nine years old in March, 1867, and that on June 27, 1867, he went alone to the shop of the defendants and purchased of them a pistol, a box of percussion caps, and two pounds of gunpowder in four packages containing one half pound each; that he carried these articles home, and with the knowledge of his aunt, who was in charge of the house and of himself in the absence from town of his father and mother, placed them in a cupboard in the sitting-room; that the powder remained in the cupboard until July 4 following, when his mother took the pistol and a portion of the powder from the cupboard and gave them to him, and with her knowledge he fired about a pound

of the powder from the pistol, until he broke the hammer of the pistol lock; that on July 9, he, with the knowledge of his mother, took from the cupboard a flask, containing a quarter of a pound of the powder, carried it into the yard adjoining the house, strewed part of the powder on the ground, left the flask containing the rest of it near the trail he had made, and fired the powder; that the flask exploded and he was burned thereby; that he bought this powder and pistol to use on July 4; and that his father was at home at night, but absent through the day, and knew nothing about this powder; and there was no evidence that the father did know anything about it. The plaintiff's mother denied any knowledge of his use of the powder on July 9.

The defendants offered no evidence, but requested the judge to instruct the jury "that there was no legal and sufficient evidence to authorize the jury to find a verdict for the plaintiff; and that the act of selling the gunpowder was not the immediate and proximate cause of the injury." The judge declined so to instruct the jury, and instructed them that "if the mother knew of the use of the powder by the plaintiff at the time of the accident, the defendants would not be responsible; but that the fact that she knew of his use of it on the preceding 4th of July would not necessarily prevent the plaintiff from recovering, unless the jury found that the fact that she knew of his use of it on the 4th of July ought to have led her to believe that the plaintiff might have obtained possession of it and used it without her knowledge, on the occasion of the accident, and if so, then it was her duty to have put it where he could not possibly have got hold of it, and the defendants would not be liable." The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

G. A. Somerby, for the defendants.

N. St. J. Green, for the plaintiff, to the point that the immediate and proximate cause of the injury was the sale of the gunpowder, cited *McDonald v. Snelling*, 14 Allen, 290; *Underhill v. Manchester*, 45 N. H. 214; *Holden v. Rutland & Burlington Railroad Co.*, 30 Vt. 297; *McGrew v. Stone*, 53 Penn. State, 436; *Marble v. Worcester*, 4 Gray, 395.

GRAY, J. The testimony introduced for the plaintiff at the trial discloses quite a different case from that alleged in the declaration, which was held sufficient when the case was before us on the demurrer; and shows that the gunpowder sold by the defendants to the plaintiff had been in the legal custody and control of the plaintiff's parents, or, in their absence, of his aunt, for more than a week before the use of the gunpowder by which he was injured. Under these circumstances, that injury was not the direct or proximate, the natural or probable consequence of the defendants' act; and the jury should have been instructed, in accordance with the defendants' request, that there was no legal and sufficient evidence to authorize them to return a verdict for the plaintiff. As this strikes at the root of the action, it is unnecessary to consider the other questions argued by counsel.

Exceptions sustained.

ILLIDGE v. GOODWIN.

1831. 5 *Carrington & Payne*, 190.¹

THE declaration stated, that the plaintiff was possessed of certain goods and porcelain, in a certain shop window ; and that the defendant was possessed of a cart and horse, which, through the negligence of his servant, was backed against the window, and broke the china ; whereby the plaintiff was put to expense, &c.

It appeared from the evidence that a scavenger's cart, with the name of Joseph Goodwin upon it, backed against the window of the plaintiff's shop, and broke a quantity of china ; and that the carman was not there at the time, but came up very soon after.

Spankie, Serjt., for defendant. I shall show that the horse was a very quiet one, and that a person passing by whipped him and made him move. This person is responsible, and not the owner of the horse. It is similar to the case of a thing thrown. See *Scott v. Shepherd*, 3 Wilson, 403. This will make it a question, whether it was such an accident as they are entitled to recover for, on the ground of negligence. Leaving a spirited horse is negligence ; but leaving a steady one, which would not move if left to himself and not struck, is not negligence.

To make out the defence opened by *Spankie*, Serjt., two witnesses were called, who swore to the striking of the horse by a person passing by ; and one added, that the horse backed against the window in consequence of the bad management of the plaintiff's shopman, who came out and laid hold of his head. During the cross-examination of the second of these witnesses, the jury interposed, and said they did not believe the evidence of either of them.

TINDAL, C. J. After all, supposing them to be speaking the truth, it does not amount to a defence. If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done.

Verdict for plaintiff.

FERGUS LANE v. ATLANTIC WORKS.

1872. 111 *Massachusetts*, 136.²

TORT. The declaration was as follows : " And the plaintiff says that the defendants carelessly left a truck, loaded with iron, in Marion Street, a public highway in Boston, for the space of twenty minutes and more ; and the iron on said truck was so carelessly and negligently

¹ Part of the case is omitted. — ED.

² The statement of the case has been much abridged. Only so much of the opinion is given as relates to one point. — ED.

placed that it would easily fall off; and that the plaintiff was walking in said highway, and was lawfully in said highway, and lawfully using said highway, and in the exercise of due care; and said iron upon said truck was thrown and fell therefrom upon the plaintiff in consequence of the defendants' carelessness, and the plaintiff was severely bruised and crippled," &c. The answer was a general denial of the plaintiff's allegations.

At the second trial in the Superior Court, before Devens, J., after the decision reported in 107 Mass. 104, the plaintiff introduced evidence that the defendants left a truck with a bar of iron on it standing in front of their works on Marion Street, which was a public highway in Boston; that the iron was not fastened, but would easily roll off the truck; that the plaintiff, then seven years old, and a boy about the same age named James Conners, were walking, between six and seven in the evening, on the side of Marion Street opposite the truck and the defendants' works; that Horace Lane, a boy twelve years old, being near the truck, called to them to come over and see him move it; that the plaintiff and Conners said they would go over and watch him do it; that they went over accordingly; that the plaintiff stood near the truck to see the wheels move, as Horace Lane took hold of the tongue of the truck; that Horace Lane moved the tongue somewhat; that the iron rolled off and injured the plaintiff's leg; and that neither the plaintiff nor Conners touched the iron or truck at all.

The jury were instructed as to what would make plaintiff a participator in the wrongful act of Horace Lane; and were also instructed, in substance, that plaintiff could not recover unless he was in the exercise of the due and reasonable care that should be expected of a person of his age. \

The defendants requested the Court to give the following instruction :

"While it is true that negligence alone on the part of Horace Lane, which contributed to the injury, combining with the defendants' negligence, would not prevent a recovery, unless the plaintiff's negligence also concurred as one of the contributory causes also; yet, if the fault of Horace Lane was not negligence, but a voluntary meddling with the truck or iron, for an unlawful purpose, and wholly as a sheer trespass, and this culpable conduct was the direct cause of the injury which would not have happened otherwise, the plaintiff cannot recover."

The Court did not give the ruling requested.

The following instructions, among others, were given : —

"If the sole or direct cause of the accident was the act of Horace Lane, the defendants are not responsible. If he was the culpable cause of the accident, that is to say, if the accident resulted from the fault of Horace Lane, they are not responsible. But if Horace Lane merely contributed to the accident, and if the accident resulted from the joint negligence of Horace Lane in his conduct in regard to moving the truck and the negligence of the defendants in leaving it there, where it was thus exposed, or leaving it so insecurely fastened that this particular

danger might be reasonably apprehended therefrom, then the intermediate act of Horace Lane will not prevent the plaintiff from recovering, provided he himself was in the exercise of due and reasonable care."

Verdict for plaintiff.

A. A. Ranney and N. Morse, for defendants.

W. G. Colburn, for plaintiff.

COLT, J. In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended.

The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-doer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Whether in any given case the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury. They present oftentimes difficult questions of fact, requiring practical knowledge and experience for their settlement, and where there is evidence to justify the verdict it cannot be set aside as matter of law. The only question for the Court is, whether the instructions given upon these points stated the true tests of liability.

[Other points disposed of.]

3. The last instruction asked was rightly refused. Under the law as laid down by the Court the jury must have found the defendants guilty of negligence in doing that from which injury might reasonably have been expected, and from which injury resulted; that the plaintiff was in the exercise of due care; that Horace Lane's act was not the sole, direct, or culpable cause of the injury; that he did not purposely roll the iron upon the plaintiff; and that the plaintiff was not a joint actor with him in the transaction, but only a spectator. This supports the verdict. It is immaterial whether the act of Horace Lane was mere negligence or a voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against. *McDonald v. Snelling*, 14 Allen, 290, 295; *Powell v. Deveney*, 3 Cush. 300; *Barnes v. Chapin*, 4 Allen, 444; *Tutein v. Hurley*, 98 Mass. 211; *Dixon v. Bell*, 5 M. & S. 198; *Mangan v. Atterton*, L. R. 1 Ex. 239; *Illidge v. Goodwin*, 5 C. & P. 190; *Burrows v. March Gas Co.*, L. R. 5 Ex. 67, 71; *Hughes v. Macfie*, 2 H. & C. 744.

Exceptions overruled.

MARS v. DELAWARE & HUDSON CANAL COMPANY.

1889. 61 *New York Supreme Court* (54 *Hun*), 625.

APPEAL by defendant from a judgment in favor of plaintiff, entered upon the verdict of a jury.

Edwin Young, for the appellant.

Edwin Countryman, for the respondent.

PUTNAM, J. Plaintiff, while lawfully on a regular passenger train of defendant, on May 20, 1884, was injured by its collision with a "wild-cat" engine. The wild-cat engine was left that evening about 7 o'clock standing upon a side track, two tracks east of the down main track, upon which the collision occurred, with its fire banked, in charge of an employee (one McFarland) whose duty it was to keep water in the boiler and take general charge of it over night. About one A. M., McFarland left the engine standing upon said side-track and went north several hundred feet to a switch-shanty. While there the engine was moved in some way across several switches upon the south-bound main track, and the engine started north, backward, without lights and with no person upon it, at full speed. It ran about half a mile and collided with the train in question.

The action is founded on the defendant's alleged negligence in leaving its engine unattended on a side-track, and it is claimed that such negligence caused the injury to plaintiff for which the action is brought. It is not clear that the act of defendant in leaving its engine on its own premises, with its fire banked and where it could not go on to any main track without passing several switches, with a competent man in charge of it, and who appears only to have left it after it had stood six hours, and when not likely to start, was under any circumstances a negligent act. A party is only answerable, as for negligence, for omitting to provide against those dangers which might be reasonably expected to occur, such as might be foreseen by ordinary forecast. *Carpenter Case*, 24 *Hun*, 108. Could defendant, by ordinary forecast, have foreseen that this engine would be moved over two or three switches, across an intervening track, on to the south-bound track and sent flying northward? We, however, in our consideration of the case, assume that the jury were authorized to find that the act of defendant and its servants, in leaving this engine on the track unattended at the time mentioned, was negligence, and hence that if that negligent act was the cause, or proximate cause, of the injury to the plaintiff, the verdict given by the jury should be sustained.

The learned judge who presided at the trial charged that, if the engine was started from where it was placed by the employees of the defendant the night before, by some person not in the employ of defendant, and taken to the main track and sent northward, thus causing the accident, the defendant was not liable; but that if such act was

done by one of defendant's employees, though negligently or wilfully, defendant would be liable. And he refused to charge that if the act was done maliciously by one of the defendant's employees (except McFarland), defendant was not liable.

[Upon the evidence, the jury might have found that the engine was moved from where it was left and was sent northward by human agency. The act by whomsoever done, was a wicked, malicious, and criminal act, subjecting the offender to criminal punishment. Even if the person so moving the engine was an employee of the defendant, yet the defendant is no more responsible for the act than if it had been done by one not in its employ. The employee, in doing such an act, would not be regarded by the law as the agent of the defendant. If a servant goes outside of his employment, and without regard to his service, acting with malice or in order to effect some purpose of his own, wantonly causes damage to another, the master is not liable.¹]

We think, therefore, that as it appeared, or the jury were authorized to find, that the engine was moved south to the main track, and then north, by some employee of defendant or other person maliciously, the defendant was entitled to have the jury instructed that if the engine was maliciously started by one of defendant's employees, other than McFarland, the defendant was not liable. Also, that the exception to the charge of the judge to the jury, that if the person who committed the act was an employee of the company, whether the act was done carelessly or wilfully, the defendant was not relieved of liability, was well taken, and hence that there should be a new trial unless the position taken by plaintiff, and next considered, is correct.

The plaintiff contends that, conceding the engine was moved maliciously by an employee of the defendant or other person, yet the negligent act of the defendant in leaving where it was a dangerous machine with fire in it, and without an attendant, was one of the concurring or proximate causes of the injury to the plaintiff, and hence that plaintiff was entitled to recover.

In *Williams v. Delaware, Lackawanna, & Western Railroad Company*, 39 Hun, 434, it is stated that "to entitle the plaintiff to recover upon the ground that defendant was guilty of negligence, in not furnishing a sufficient number of brakemen, it was incumbent on the plaintiff to show that his injury was the result of such negligence; that it was the natural and probable consequence of the defendant's omission, and that the accident would not have happened but for such omission." Wharton says: "Supposing that if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the

¹ The passages enclosed in [] are an abridgment of the opinion of the court on this branch of the case. — ED.

interposition of independent responsible human action." Wharton's Law of Negligence, § 134. The negligent act which is the proximate cause of the injury is an act which naturally and probably would produce it. *Kerrigan v. Hart*, 40 Hun, 390, 391; *Williams' Case*, *supra*; *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *Lowery v. Manhattan Ry. Co.*, 99 id. 158; *Pollett v. Long*, 56 id. 200; *Hofnagle v. N. Y. C. & H. R. R. Co.*, 55 id. 608. That is, where the negligent act is the cause of the injury and where there is no intervening agency affecting or changing the operation of the primal cause. *Reiper v. Nichols*, 31 Hun, 495.

The injury to plaintiff, for which this action is brought, was not caused by the neglect of the defendant in leaving its car on the track. The injury was not the natural or ordinary result of such an act. It could not have been foreseen. Between the alleged negligence of defendant and the accident intervened a wilful, malicious, and criminal act of a third person, which caused the injury and broke the connection between defendant's negligence and the accident. In fact, some person stole defendant's engine and sent it flying up the track, and this wicked criminal act was the cause of the injury to the plaintiff, and defendant's act in leaving the engine where the criminal could start it was in no sense the proximate cause of the injury, or an act which ordinarily or naturally could have produced it.

Plaintiff has called our attention to a large number of cases bearing on the question discussed. We have examined those cases and do not think that any of them are quite parallel to this case. None of them held that where, between the negligent act and the injury, there intervened a wilful, malicious, and criminal act, which was the immediate cause of the injury, and where the injury was not the ordinary or probable result of the negligence complained of, and could not have been foreseen, that such negligence is the proximate cause of the injury.

In the cases cited by plaintiff it will be found that the injury was the natural, probable, or direct result of the negligent act. In the *Cohen Case*, 113 N. Y. 532, the injury was the direct result of the wrongful act of the city of New York, in allowing a person to keep a nuisance in the street. In *Lane v. Atlantic Works*, 111 Mass. 136, the Court put the decision on the ground "that the original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated. In *Illidge v. Goodwin*, 5 Carr. & P. 190, a horse and cart were left in the street without an attendant. A wrong-doer struck the horse, started him, and he did the injury complained of. But a horse standing in the street is liable to run away. It may become restless or frightened, or be started by a wrong-doer. The injury in that case was the natural and ordinary consequence of the neglect shown and should have been foreseen. That case is very briefly reported. It does not appear whether the striking of the horse was merely a negligent striking or a wilful act. If in that case some one had taken the reins and

driven the cart into another street, and started the horse on a run against another wagon on that street, the case would have been more like this.

The case before us (assuming that some person maliciously started the engine) might be deemed like that of a man who negligently left a loaded gun on his premises, accessible to the public, which some one took and with it injured another. Would the owner of the gun be liable for the injury? In *Binford v. Johnston*, 82 Ind. 428, it was held that the fact that some agency intervened between the original negligence and the injury, did not preclude a recovery if the injury was the natural and probable result of the original wrong. In the *Lowery Case*, 99 N. Y. 163, it was held, although the act of the driver intervened between the negligence of the defendant and the injury, that the act of the driver, in view of the exigencies of the case, whether prudent or otherwise, may well be considered as a continuation of the original act which was caused by the neglect of defendant. In the "Squib" case the intermediate parties were held to have acted mechanically in a sudden, convulsive act, so that the injury was in fact deemed caused by the original negligent act of the defendant. So we think that all the cases cited by the plaintiff will be found to differ from the case we are considering in the regard above suggested.

We think there should be a new trial. If such a state of facts appear on the retrial that the jury would be authorized to find that the engine started itself, without being set in motion by any human agency, found its way on to the main track, and thus caused the accident, we think the case would properly be submitted to the jury. Should it appear, however, that some wrong-doer criminally placed the engine on the south-bound track and started it northward, we are of the opinion that the defendant could not be held liable. In that case defendant could not be deemed negligent as to the plaintiff.

The judgment should be reversed and a new trial granted, costs to abide the event.

LEARNED, P. J., concurred.

LONDON, J. (dissenting): The case of *Lane v. Atlantic Works*, 111 Mass. 136, states very clearly the propositions governing this case. The injury must be the direct result of the misconduct charged, but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-doer, if such act ought to have been foreseen. Practical knowledge and experience are required for the determination of the question whether some such injurious interference and result ought to have been apprehended, and the verdict of the jury usually determines this question. Here the jury have answered the questions involved as follows: When the engine was abandoned it was reasonable to apprehend that some weak or wicked person would be tempted to set it in motion. A

jury of railroad superintendents would probably concur in that conclusion. If thus set in motion, injury was to be apprehended to whatever persons or property might then happen to be exposed. The plaintiff was exposed, and therefore injured.

I advise an affirmance of the judgment.

Judgment reversed, new trial granted, costs to abide event.

PASTENE v. ADAMS.

1874. 49 California, 87.¹

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The defendants were lumber dealers in the city of San Francisco, and had a lumber yard on the easterly side of Stewart Street, between Howard and Folsom streets. Their office fronted on the east side of Stewart Street, which runs north and south, and there were two gangways or roads leading from the street into the lumber yard, one on the north side of the office and one on the south, each about twelve feet wide. The distance between these gangways was about thirty-five feet. In front of the office, and in Stewart Street, and between the gangways, the defendants had piled three tiers of timbers, about twelve inches square. The ends of these timbers extended to the gangways, but they were so laid, one upon another, that the ends of some projected more than others. The plaintiff went to the defendants' office to purchase lumber, and started from the office with a clerk, to walk down Stewart Street, alongside of the timbers to the gangway. While walking close to the timbers, one Randall drove a team from the yard through the gangway to the street, and in doing so, the wheel caught the end of one of the timbers and threw it down. The plaintiff's leg sustained such an injury as to render amputation necessary. This action was brought to recover damages for the injury he thus sustained. There was an issue made in the pleadings as to whether the timbers were carelessly piled. The timbers had lain there for several months. The jury gave a verdict for the plaintiff for two thousand dollars damages, and the defendants appealed.

W. H. Patterson and Wm. Irvine, for the appellants.

The entire case made by the plaintiff's proofs rested upon the legal proposition upon which the action was based, that the act of piling the timber in the roadway by the defendants made them responsible for any consequences of injury resulting therefrom, however remotely, and though directly occasioned by the act of another; which proposition, we submit, cannot be maintained.

¹ Portions of the arguments are omitted. — Ed.

The following cases demonstrate the rule that the injury must have been immediately occasioned by the act of imputed negligence, or the result would have been the natural or necessary consequence thereof: *Ryan v. New York Central Railroad Co.*, 35 New York R. 210; *Penn. Railroad Co. v. Kerr*, 62 Penn. (State) R. 353, 364; *Denny v. New York Central Railroad Co.*, 13 Gray (Mass.), R. 481; *Railroad Co. v. Reeves*, 10 Wallace (U. S.) R. 176; *Morrison v. Davis*, 20 Penn. (State) R. 171; *Griggs v. Fleckenstien*, 14 Minnesota R. 81-89.

The doctrine of these authorities is that the defendant is only responsible for the natural and proximate, and not for the remote consequences following from his acts. If a subsequent and distinct cause, intervening after that for which the defendant is responsible, had ceased to act, has been productive of injury, and but for that no injury would have occurred, the defendant is not responsible.

R. W. Hent and *H. L. Joachimsen*, for the respondent.

The defendants furnished the means and facility for the commission of the injury to the plaintiff.

Both the negligence of defendants in piling lumber into the street, and allowing it to remain there, and their negligent manner of piling it where it was, if not the sole, or in point of time the immediate, causes of the injury complained of, concurred with the driving of Randall's team to produce the injury, and defendants are, therefore, responsible; it clearly appearing that, but for such negligence, the injury would not have happened, and both circumstances being closely connected with the injury in the order of events. *Shear. & Red. on Neg.*, sec. 10, and authorities cited in note 2.

The fault of a mere stranger, however much it may contribute to the injury, is no defence for one whose negligence helped to bring the injury about. *Shear. & Red. on Neg.*, secs. 27, 46.

By the Court, *McKINSTRY, J.* If the timbers were negligently piled by the defendants, the negligence continued until they were thrown down, and (concurring with the action of Randall) was a direct and proximate cause of the injury sustained by the plaintiff.

Judgment affirmed.

VILLAGE OF CARTERVILLE v. COOK.

1889. 129 *Illinois*, 152.

APPEAL from the Appellate Court for the Fourth District: heard in that court on appeal from the Circuit Court of Williamson County; the Hon. David J. Baker, Judge, presiding.

Mr. J. M. Washburn and *Mr. W. W. Barr*, for the appellant.

A municipal corporation may determine for itself to what extent it will guard against mere possible accidents. 2 *Dillon on Mun. Corp.*

sec. 1005; *Lansing v. Toolon*, 37 Mich. 132; *Freeport v. Isbell*, 83 Ill. 440.

Want of railings is not negligence *per se*. *Staples v. Canton*, 69 Mo. 592; *Fairbury v. Rogers*, 2 Bradw. 96; *Grayville v. Whitaker*, 85 Ill. 439.

It is only required to keep its sidewalks in a reasonably safe condition. *Centralia v. Krouse*, 64 Ill. 19; *Chicago v. McGiven*, 78 id. 347; *Chicago v. Bixby*, 84 id. 84; *Bloomington v. Read*, 2 Bradw. 542.

It is not liable for an injury caused by the combined effect of the unsafe condition of a highway and the unlawful or careless acts of a third person. *Sheppard v. Chelsea*, 4 Allen, 113; *Rowell v. City of Lowell*, 7 Gray, 103; *Rockford v. Tripp*, 83 Ill. 248; *Marble v. Worcester*, 4 Gray, 395; *Quincy v. Barker*, 81 Ill. 300; *Lovenguth v. Bloomington*, 71 id. 238; 2 Dillon on Mun. Corp. sec. 1006.

Mr. B. W. Pope and *Mr. George W. Young*, for the appellee.

Whether a sidewalk is really defective, is a question of fact. *Burt v. Boston*, 122 Mass. 223.

Whether a railing or a light at any part of the highway is necessary, is a question of fact for the jury. 4 Wait's Actions and Defences, 677; Shearman & Redfield on Negligence, secs. 390, 391, 414; *Houfe v. Town of Fulton*, 29 Wis. 296; 9 Am. Rep. 568; *Leicester v. Town of Pittsford*, 6 Vt. 245.

Whether or not a sidewalk is properly constructed, is a question within the province of a jury. *Sullivan v. Oshkosh*, 55 Wis. 558; *Morrill on City Negligence*, 236.

It is the duty of a municipal corporation to keep its streets, &c., in a reasonably safe condition for public use. *Dewire v. Bailey*, 131 Mass. 169; *Niven v. Rochester*, 76 N. Y. 619.

The city is charged with a duty to keep its streets in order, and, it may almost be said, is bound to act upon the assumption that they are unsafe. *Morrill on City Negligence*, 136.

When two causes combine to produce an injury to a traveller upon a highway, both of which are in their nature proximate, the one being a culpable defect in a highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect. *Clark v. Lebanon*, 63 Me. 393; *Macauley v. New York*, 67 N. Y. 602; *Kennedy v. New York*, 73 id. 365; *Galveston v. Posnainsky*, 62 Texas, 118; *Crawfordsville v. Smith*, 79 Ind. 308; *Morrill on City Negligence*, 106.

Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event, other than the plaintiff's fault, to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is re-

sponsible, even though his negligent act was not the nearest cause in order of time. Shearman & Redfield on Negligence, secs. 10, 596, 27, 45; 4 Wait's Actions and Defences, 719.

Where a town neglected to keep a highway reasonably safe, the fact that there was negligence of a third party in contributing to the injury is of no consequence. *Burrell Township v. Uncapher*, 4 Pa. (L. ed.) 756.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court: The evidence given upon the trial tended to prove that the plaintiff, a boy of some fifteen years of age, while in the observance of ordinary care for his own safety, passing along a much used public sidewalk of the defendant, was by reason of the inadvertent or negligent shoving by one boy of another boy against him, jostled or pushed from the sidewalk, at a point where it was elevated some six feet above the ground, and was unprotected by railing or other guard, and thereby seriously injured in one of his limbs.

The objection urged against the ruling in refusing and modifying instructions, presents the question whether, conceding the negligence of the defendant in omitting to reasonably guard the sidewalk at the point where plaintiff was injured, by railing or otherwise, the concurring negligence of a third party over whom it had no control, in producing the injury, releases it from liability. The Supreme Court of Massachusetts have held in *Rowell v. City of Lowell*, 7 Gray, 103; *Kidder v. Dunstable*, id. 104, and *Shephard et ux. v. Inhabitants of Chelsea*, 4 Allen, 113, that it does. These cases, however, seem to rest, to some extent, upon the phraseology of the Massachusetts statute, which is less comprehensive, in this class of cases, than is the ruling in this Court. *Chicago v. Keefe, Admr.*, 114 Ill. 222. At all events, we are committed to a different line of ruling upon this question. In *Joliet v. Verley*, 35 Ill. 58, *Bloomington v. Bay*, 42 id. 503, and *City of Lacon v. Page*, 48 id. 500, we held, that if a person, while observing due care for his personal safety, be injured by the combined result of an accident and the negligence of a city or village, and the injury would not have been sustained but for such negligence, yet, although the accident be the primary cause of the injury, if it was one which common prudence and sagacity could not have foreseen and provided against, the negligent city or village will be liable for the injury.

It is not perceived how, upon principle, the intervention of the negligent act of a third person, over whom neither the plaintiff nor the defendant has any control, can be different in its effect or consequence, in such case, from the intervention therein of an accident having a like effect. The former no more than the latter breaks the causal connection of the negligence of the city or village with the injury. The injured party can no more anticipate and guard against the one than the other, and the elements which constitute the negligence of the city or village must be precisely the same in each case; and we have accordingly held, that where a party is injured by the concurring negligence of two dif-

ferent parties, each and both are liable, and they may be sued jointly or separately. *Wabash, St. Louis, & Pacific Ry. Co. v. Shacklet*, *Admx.*, 105 Ill. 364; *Transit Co. v. Shacklett*, 119 id. 232. And this is abundantly sustained by decided cases elsewhere. *Northern Pennsylvania Railroad Co. v. Mahoney*, 57 Pa. St. 187; *Cleveland, &c. Railroad Co. v. Terry*, 8 Ohio St. 570; *Smith v. N. Y., S. & W. Railroad Co.*, 46 N. J. L. 7; *Webster v. Hudson River Railroad Co.*, 38 N. Y. 260; Patterson on Railway Accident Law, secs. 39, 95, and cases cited in notes appended to each section. See, also, Shearman & Redfield on Negligence, (2d ed.) secs. 10, 27, 46, 401. And we have applied the same rule in a suit for negligence against a municipal corporation. *Peoria v. Simpson*, 110 Ill. 301.

The Massachusetts rule seems to be applied also in Maine, *Moulton v. Sanford*, 51 Me. 127; *Wellcome v. Leeds*, id. 313, but it seems to have been elsewhere repudiated when the question has been considered. See *Hunt v. Pownal*, 9 Vt. 411, and authorities cited *supra*.

The instructions as given fairly presented the law of the case to the jury; and concurring, as we do, fully, with the views expressed in the opinion of the Appellate Court by Mr. Justice Green, *Village of Carterville v. Cook*, 29 App. Ct. R. 495, we deem it unnecessary to comment further upon the rulings below.

The judgment is affirmed.

Judgment affirmed.

Mr. Justice Baker, having tried this case in the Circuit Court, took no part in its consideration here.

MATHEWS v. LONDON STREET TRAMWAYS CO.

1888. 60 *Law Times Reports, New Series*, 47.

QUEEN'S BENCH DIVISION.

Before POLLOCK, B., and MANISTY, J.

THIS was a motion on behalf of the plaintiff for a new trial on the ground of misdirection in an action, tried before Field, J., and a special jury, on the 22d June, 1888.

The action was brought to recover damages for injuries sustained by the plaintiff through the negligence of the defendants' servants, and the facts were as follows:—

The plaintiff was an outside passenger on an omnibus running from Highgate to Kentish Town. In descending a hill the omnibus overtook a handcart near the kerb, and in order to pass it pulled on to the tramway line. A tramcar was coming up the hill at the time, the driver of

the tramcar pursued his course, and a collision took place, by-reason of which the plaintiff was thrown off and suffered severe injuries.

The learned judge summed-up to the jury to the effect that, to find a verdict for the plaintiff, they must be satisfied that the accident which was the cause of the injuries he sustained occurred solely through the negligence of the defendants' servants, and that they should find a verdict for the defendants unless they were satisfied that the accident was due to the negligence of the defendants; and he refused to direct them that if they found that but for the negligence of both the defendants and the omnibus driver the accident would not have happened, then the verdict should be for the plaintiff; and refused to leave to the jury the question whether the accident did so happen.

The jury found for the defendants. The plaintiff moved to set aside the verdict on the ground above stated.

Kemp, Q. C., and R. Vaughan Williams, for the plaintiff.

It was the duty of both drivers to exercise care; if the driver of the omnibus was guilty of negligence in pulling on to the tramway line to pass the handcart, the driver of the tramcar ought to have stopped when he saw the omnibus in his way. [POLLOCK, B. — Did not the accident happen through the combined negligence of both drivers?] Since the case of *The Bernina*, 58 L. T. Rep. n. s. 423; 13 H. L. App. Cas. 1, the plaintiff is entitled to recover even if the driver of the omnibus was careless, provided the driver of the tramcar could have avoided the accident by exercising care, as a passenger is not identified with the negligence of the driver of an omnibus. The jury should have been asked whether the collision occurred, first, through the sole negligence of the driver of the tramcar; secondly, through the sole negligence of the driver of the omnibus; and lastly, through the joint negligence of both drivers. The learned judge was guided by the case of *Thoroughgood v. Bryan*, 8 C. B. 115, which was overruled by *The Bernina*, 58 L. T. Rep. n. s. 423; 13 App. Cas. 1, and did not leave the question of joint negligence to the jury.

Tindal Atkinson, Q. C., and Atherley Jones, for the defendants.

If the question of joint negligence had been left to the jury, it would have been irrelevant. The word "solely" comes in in the wrong place. Looking at the context the learned judge directed the jury to discard contributory negligence, as it would not prejudice the plaintiff's claim. [POLLOCK, B. — Is not "solely" an unfortunate word to have used?] The jury were distinctly told that the plaintiff would not be debarred from recovering owing to the negligence of the omnibus driver. The accident was caused by the negligence either of the omnibus driver or of the tramcar driver. The jury came to the conclusion that it was caused by the negligence of the omnibus driver, and there was no question of contributory negligence. "Solely" need not necessarily bear the interpretation put upon it by the plaintiff, and the learned judge may have meant that the jury were to treat the negligence of the tramcar driver, together with that of the omnibus driver, as solely that of the tramcar driver.

R. Vaughan Williams in reply. The learned judge asked the jury, after they had returned their verdict, whether the accident was caused by the negligence of both drivers, and so showed that he had not left the question of joint negligence to them.

POLLOCK, B. This is one of those cases in which the Court has a disagreeable task to perform, namely, to say whether the language of the learned judge was sufficient for the particular facts of the particular case before us. I think that the manner in which this case was left to the jury is not satisfactory, and that the verdict depending upon it ought not to be upheld. The facts of the case are as follows: The plaintiff was riding on the outside of an omnibus running from Highgate to Kentish Town. In descending a hill the omnibus had to pass a handcart near the kerb, and in doing so pulled on to the tramway line. A tramcar was coming up the hill at the time, the driver of the tramcar pursued his course, and a collision took place. The old law, as decided in *Thorogood v. Bryan*, 8 C. B. 115, in 1849, was, that a person by selecting a particular conveyance so identified himself with it that, if an accident occurred in part caused by his own driver's negligence, although that driver was not his own selection, nor his own servant, the traveller, if injured, must be deemed to have been a contributory to his own injury by his own negligence, and could not recover. In the case of *Mills v. Armstrong and another; The Bernina*, 58 L. T. Rep. n. s. 423; 13 H. of L. App. Cas. 1, decided in the House of Lords in 1888, it was held (affirming the decision of the Court of Appeal) that the old law on the subject could not be sustained, and that the reasons on which the judgment in *Thorogood v. Bryan* was founded were inconclusive and unsatisfactory. That being so, the question for us to decide is, what was the proper summing-up to the jury? It is clear that, if facts in a case do arise which raise certain points of law, then it is the duty of the judge to call the attention of the jury to the law as affecting the facts. It would have been impossible for the jury to have decided this case without having considered what part the omnibus driver had taken. The learned judge told them to discard the conduct of the omnibus driver, and I think that in doing so he was wrong. The judge went on to tell the jury that, to find a verdict for the plaintiff, they must be satisfied that the accident occurred solely through the negligence of the defendants. Mr. Vaughan Williams asked the learned judge to give the following further direction to the jury: "If the accident would not have happened but for the negligence of the omnibus driver and the tramcar driver, the plaintiff is entitled to the verdict." This direction does not appear to me to involve the proper question in this case. The learned judge refused to give this direction, but did ask the jury after they had returned their verdict, Would the accident have happened but for the negligence of both drivers? The jury said that they were unable to answer this question. This shows that the jury had not considered the question of joint negligence before returning their verdict. There is therefore vice in the verdict, which cannot be upheld.

MANISTY, J. I am of the same opinion. This is a case which may frequently occur. The facts are very clear. The omnibus driver saw a handcart in front of him, and in order to avoid it he pulled on to the tramway line. The tramcar was thirteen yards off, and the driver went on, notwithstanding the fact that the omnibus was on the line. These facts raise two questions: (1) Was there negligence on the part of the omnibus driver? (2) Was there negligence on the part of the tramcar driver? It appears to me that it was the duty of the learned judge to give the jury the following direction: Was there negligence on the part of the tramcar driver which caused the accident? If so, it is no answer to say that there was negligence on the part of the omnibus driver. The learned judge did say: If the defendants' servants were the sole cause of the injury, and if their negligence was the cause of the accident, find for the plaintiff. I do not understand the direction which Mr. Vaughan Williams wished the judge to give the jury. The learned judge told the jury three times not to find for the plaintiff unless they thought that the defendant was solely liable. The verdict, to my mind, is unsatisfactory and there must be a new trial.

Order for a new trial.

HOGLE v. NEW YORK CENTRAL, &c. RAILROAD
COMPANY.

1882. 28 Hun (35 New York Supreme Court), 363.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

The action was brought to recover damages for injury to the plaintiff's woods, occasioned by a fire alleged to have been caused by the negligence of the defendant in the management and construction of its engines.

S. W. Jackson, for the appellant.

D. M. Chadsey, for the respondent.

BY THE COURT. The Court was requested by the defendant to charge that when the plaintiff discovered the fire, if he neglected to use reasonably practicable means to suppress it, he could not recover for subsequent damages. The Court refused, holding that as the plaintiff was not at fault in the origin of the fire, he was not bound to make any effort to suppress it. We think that this was erroneous. Let us suppose that the plaintiff has seen a little spark of fire beginning to spread among dry leaves; that he could have put it out with a stamp of his foot; but that he knowingly neglected to do this, and thus permitted the fire to extend until it destroyed several acres of his woods. Would it be

just that he should make the defendant pay all the damages he had suffered? Clearly not. It may be that he would not be bound to use every possible effort to suppress the fire. But the language of the request was well chosen. He should do what was reasonably practicable. To say that he need not do what he reasonably could to suppress the fire is not very far from saying that he might do what he could to increase it. The wrong done by the defendant was not intentional. And if it were in the plaintiff's power, by reasonable efforts, to prevent the increase of the wrong, he should use that power. *Bevier v. D. & H. C. Co.*, 13 Hun, 254; *Milton v. Hudson R. Steamboat Co.*, 37 N. Y. 214.

This is analogous to the rule which requires the innocent party to a broken contract of hire of services to earn what he can in other ways, and thus diminish the damages to be paid by the other party.

The judgment must be reversed and a new trial granted, costs to abide the event.

Judgment and order reversed, new trial granted, costs to abide event.

LOKER v. DAMON.

1835. 17 *Pickering*, 284.¹

TRESPASS *quare clausum*. The declaration set forth, that the defendants destroyed and carried away ten rods of the plaintiff's fences, in consequence of which certain cattle escaped through the breach and destroyed the plaintiff's grass, and that he thereby lost the profits of his close from September, 1832, to July, 1833.

At the trial before Morton, J., the plaintiff proved, that the defendants, in the latter part of November, removed portions of the stone wall inclosing the *locus*, and thus made a passageway through it; that these breaches were not repaired till after the middle of the succeeding May, when they were closed up by the plaintiff; and that in the mean time, the cattle of the plaintiff and others passed into the close, and fed upon the grass; that the close contained four or five acres; and that in 1832, it produced about a ton of hay to the acre. The close was a part of the farm on which the plaintiff lived.

A default was entered, the damages to be assessed at \$1.50, unless the Court should be of opinion, that the plaintiff could recover damages beyond a remuneration for replacing the fences; in which case the damages were to be assessed upon such principles as the Court should determine.

Josiah Adams and Keith for defendants.

Mellen, for plaintiff.

¹ Only so much of the case is given as relates to the measure of damages. — Ed.

SHAW, C. J. The Court are of opinion, that the direction respecting damages was right. In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open and passes it frequently, and wilfully and obstinately or through gross negligence leaves it open all summer, and cattle get in, it is his own folly. So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the costs of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence. I do not mean to say, that other damages may not be given for injury in breaking the plaintiff's close, but I mean only to say, that in the actual circumstances of this case, the cost of replacing the fence, and not the loss of an ensuing year's crop, is to be taken as the rule of damages, for that part of the injury which consisted in removing the fence and leaving the close exposed.

Judgment on the default, for the sum of \$1.50 damages.

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CHAPTER II.

WHETHER PLAINTIFF'S ACTION IS BARRED BY HIS OWN WRONG.¹

WELCH v. WESSON.

1856. 6 *Gray*, 505.

ACTION OF TORT for running down the plaintiff while driving on the highway, and breaking his sleigh. Trial in the Court of Common Pleas, before Mellen, C. J., who signed a bill of exceptions, the substance of which is stated in the opinion.

G. F. Verry, for the plaintiff.

C. E. Pratt, for the defendant.

MERRICK, J. It appears from the bill of exceptions to have been fully proved upon the trial that the defendant wilfully ran down the plaintiff and broke his sleigh, as is alleged in the declaration. No justification or legal excuse of this act was asserted or attempted to be shown by the defendant; but he was permitted, against the plaintiff's objection, to introduce evidence tending to prove that it was done while the parties were trotting horses in competition with each other for a purse of money, the ownership of which was to be determined by the issue of the race. And it was ruled by the presiding judge, that if this fact was established, no action could be maintained by the plaintiff to recover compensation for the damages he had sustained, even though the injury complained of was wilfully inflicted. Under such instructions, the jury returned a verdict for the defendant.

We presume it may be assumed as an undisputed principle of law, that no action will lie to recover a demand, or a supposed claim for damages, if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing, and depending in any degree upon an illegal agreement, to which he himself had been a party. *Gregg v. Wyman*, 4 Cush. 322; *Woodman v. Hubbard*, 5 Foster, 67; *Phalen v. Clark*, 19 Conn. 421; *Simpson v. Bloss*, 7 Taunt. 246. But this principle will not sustain the ruling of the Court, which went far beyond it, and laid down a much broader and more comprehensive doctrine. Taken without qualification, and just as they were given to the jury, the instructions import that, if two persons are engaged in the same unlawful enterprise, each of them,

¹ See also chapter on "Contributory Negligence," *post*. — Ed.

during the continuance of such engagement, is irresponsible for wilful injuries done to the property of the other. No such proposition as this can be true. He who violates the law must suffer its penalties; but yet in all other respects he is under its protection, and entitled to the benefit of its remedies.

But in this case the plaintiff had no occasion to show, in order to maintain his action, that he was engaged, at the time his property was injured, in any unlawful pursuit, or that he had previously made any illegal contract. It is true that, when he suffered the injury, he was acting in violation of the law; for all horse trotting upon wagers for money is expressly declared by statute to be a misdemeanor punishable by fine and imprisonment. *St.* 1846, c. 200. But neither the contract nor the race had, as far as appears from the facts reported in the bill of exceptions, or from the intimations of the Court in its ruling, anything to do with the trespass committed upon the property of the plaintiff. That he had no occasion to show into what stipulations the parties had entered, or what were the rules or regulations by which they were to be governed in the race, or whether they were in fact engaged in any such business at all, is apparent from the course of the proceedings at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ, and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from proof of the illegal agreement and conduct in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another.

Exceptions sustained.

STEELE v. BURKHARDT.

1870. 104 *Massachusetts*, 59.

TORT for injury alleged to have been caused to the plaintiffs' horse by the negligence of the defendant's servant; submitted to the judgment of the Superior Court, and, on appeal, of this Court, upon the following award of an arbitrator as upon a statement of agreed facts:—

“I find that the injury to the plaintiffs' horse, for which they seek to recover damages in this action, was occasioned by the negligence

and want of due care of the defendant's servant, then in the employment of the defendant. At the time of the injury, the plaintiffs' wagon, to which the injured horse was attached, was placed in Clinton Street in the city of Boston, by the plaintiffs' driver, having the care of the wagon for the loading of certain articles, the weight of which in each and every package thereof was less than five hundred pounds; and the wagon was then wholly or in part backed and placed across Clinton Street, and thereby the plaintiffs were guilty of a violation of an ordinance of the city, which provides as follows: 'And for the loading or unloading of any dirt, bricks, stones, sand, gravel, or of any articles, whether of the same description or not, the weight of which in any one package shall be less than five hundred pounds, no truck, cart, wagon, sleigh, sled, or other vehicle shall be wholly or in part backed or placed across any street, square, lane, or alley, or upon flag-stones or crossings of the same, but shall be placed lengthwise, and as near as possible to the abutting stone of the sidewalk or footway; and any owner or driver or other person having the care of any such vehicle, violating either of the provisions of this section, shall be liable to a fine of not less than five dollars, nor more than twenty dollars, for each offence.' It is in evidence that, at the time of the injury, there was sufficient room, with proper care, for the defendants' team to pass through Clinton Street (a greater degree of care being required by reason of the position of the plaintiffs' team as aforesaid, but not greater than the defendant was bound to use, in my judgment), but the defendant's servant, in passing between the plaintiffs' horse and the opposite curb-stone, ran over and upon the hoof of the plaintiffs' horse, with a heavy team, and in so doing was guilty of the negligence which I report; and I further find, that the only fault upon the part of the plaintiffs is the fact of their horse and wagon having been placed against the curb in violation of the city ordinance above mentioned.

"In case the Court shall find, under the foregoing statement of facts, that the violation hereinbefore mentioned of said ordinance, on the part of the plaintiffs' driver, debarred the plaintiffs from maintaining their action for damages, my award would be judgment for the defendant for his costs of court, with the costs of this reference; otherwise, my award would be for the plaintiffs, for the sum of \$225 and their costs of court."

H. J. Stevens, for the plaintiffs.

A. Russ, for the defendant.

CHAPMAN, C. J. The act complained of by the plaintiffs is, that while their horse was standing on Clinton Street, the defendant's servant, while driving a heavy team along the street, carelessly drove it upon the hoof of the plaintiffs' horse, and injured him. The award, which the parties have agreed to accept as a statement of facts, finds that the injury was occasioned by negligence and want of due care in the defendant's servant. The terms of this finding imply that there

was no negligence on the part of the plaintiffs, which contributed to the injury. And it is further found that, though the plaintiffs' team was standing there in violation of a city ordinance, yet there was room for the defendant's team to pass by, using due care, and the only fault of the plaintiffs consisted in the violation of the city ordinance. It is not found that this violation contributed to the injury. It is said by Bigelow, C. J., in *Jones v. Andover*, 10 Allen, 20, that, "in case of a collision of two vehicles on a highway, evidence that the plaintiff was travelling on the left side of the road, in violation of the statute, when he met the defendant, would be admissible to show negligence." So the evidence that the plaintiffs' team was standing in the street in violation of a city ordinance was admissible to show negligence on their part. It did show negligence in respect to keeping the ordinance, but did not necessarily show negligence that contributed to the injury. And, notwithstanding this evidence, it was competent to the arbitrator to find, as a fact, that, towards the defendant, the plaintiffs were guilty of no negligence, but were careful to leave him ample room to pass. He did so find in substance; and his finding is agreed to as a fact.

A collision on the highway sometimes happens, when both parties are in motion, and both are active in producing it. In such cases, the plaintiff must prove that he was not moving carelessly. But the collision sometimes happens, as in this case, when the plaintiffs' team is standing still. In such a case, he must prove that his position was not so carelessly taken as to contribute to the collision. The fact is here found that it was not so taken, though it was in violation of the ordinance. There was therefore no such negligence on his part as to defeat the action.

Actions founded on negligence are governed by a plain principle. The plaintiffs' declaration alleges that the injury happened in consequence of the negligence of the defendant. This is held to imply that there was no negligence on the part of the plaintiff which contributed to the injury; and to throw upon him the burden of proving the truth of the allegation. It may depend upon care exercised by himself personally, or by his coachman, if he is riding; or by his teamster, in his absence; or by the person in charge of him, if he is an invalid, or an infant of tender years, or in any way so situated as to need the care of another person in respect to the matter. If there was want of care, either on the part of himself or the person acting for him, and the injury is partly attributable directly to that cause, he cannot recover, simply because he cannot prove what he has alleged. Among the numerous cases sustaining this view are, *Parker v. Adams*, 12 Met. 415; *Horton v. Ipswich*, 12 Cush. 488; *Holly v. Boston Gas Light Co.*, 8 Gray, 131; *Wright v. Malden & Melrose Railroad Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401.

But it is further contended that these plaintiffs are compelled to prove their own violation of law in order to establish their case, and there-

fore the action cannot be maintained. The substance of the ordinance referred to is, that for loading and unloading packages weighing less than five hundred pounds, wagons shall stand lengthwise of streets, and not crosswise, under a prescribed penalty. The plaintiffs were loading packages of less weight, and their wagon was standing crosswise of the street. But proof of the weight of these packages was not necessary. In this respect the case is like that of *Welch v. Wesson*, 6 Gray, 505, where the plaintiff was injured while he was trotting his horse illegally. It is unlike the cases of *Gregg v. Wyman*, 4 Cush. 322, and *Way v. Foster*, 1 Allen, 408, which were decided in favor of the defendant upon the ground that the plaintiff was obliged to lay the foundation of his action in his own violation of law. Even in those cases, the violation of law by the plaintiffs would not have justified an assault and battery or a false imprisonment of the plaintiffs. In this case, if the packages had weighed more than five hundred pounds, the position of the team would have been the same. In *Spofford v. Harlow*, 3 Allen, 176, it was held that, though the plaintiff's sleigh was on the wrong side of the street, in violation of law, the defendant was liable, if his servant ran into the plaintiff carelessly and recklessly, the plaintiff's negligence not contributing to the injury. And it is true generally, that while no person can maintain an action to which he must trace his title through his own breach of the law, yet the fact that he is breaking the law does not leave him remediless for injuries wilfully or carelessly done to him, and to which his own conduct has not contributed.

Judgment for the plaintiffs.

BELL, J., IN NORRIS v. LITCHFIELD.

1857. 35 *New Hampshire*, 277, 278.

BUT the idea of the defendant's counsel was, that if the plaintiff was himself a wrong-doer, he could maintain no action whatever, however prudent and careful he may have been.

There are decisions which give countenance to this idea, and which hold that where a party who has suffered a loss by the negligence of another, was himself at the time a trespasser, or acting in violation of law, he cannot recover. *Munger v. Tonawanda Railroad*, 4 Coms. 349; *Hartfield v. Roper*, 21 Wend. 615; *Brown v. Maxwell*, 6 Hill, 592, and cases there cited.

But we are unable to agree to the doctrine thus broadly laid down. As a general principle it seems to us wholly immaterial, whether, in the abstract, the plaintiff was a wrong-doer or a trespasser, or was acting in violation of law. For his wrong or trespass he is answerable in damages, and he may be punishable for his violation of law; but his

rights as to other persons and as to other transactions are not affected by that circumstance. A traveller may be riding with a horse or carriage which he had no right to take or use; he may be travelling on a turnpike without payment of toll; he may be riding on a day when riding is forbidden, or with a speed forbidden by law, or upon what is called the wrong side of the road; or his team may be standing in the street of a town, without his attending by them and keeping them under his command, as the law requires; and in none of these cases is his right of action for any injury he may sustain from the negligent conduct of another in any way affected by these circumstances. He is none the less entitled to recover, unless it appears that his negligence or his fault has directly contributed to his damage. He may be a trespasser, and his trespass may have in no degree contributed to the damage he has sustained. Though a trespasser or a wrong-doer as to others, he may have been guilty of neither fault nor negligence as to the party from whom he has sustained damage. Though engaged in an act which is a violation of law in itself, he may have exercised all proper care for the safety of himself and his property, and to avoid any injury to another. A trespass is not the less a wrong that it is done by accident, or without design, or even against the will of the actor; but in such case it is not a fault, in the sense of that word, as used in connection with actions for negligence.

So a party may do an act which is a violation of law, and which may perhaps subject him to liability to those who may sustain damage by his conduct; yet it may not be an offence which would subject him to punishment, because the act may have been involuntary,—done without negligence, and against his most earnest efforts. In such a case the act is a misfortune; it is not a fault.

It is not enough, then, to show that a party is a wrong-doer, or a trespasser, or violator of the law, to defeat his action for damage sustained from the negligence of another.

It must be shown that such act is a fault which has directly contributed to the loss or damage of which the party complains. It is not a question, as it has been made in some cases, whether the party is a trespasser, or has done some wrongful act, but whether he is guilty of a fault or of negligence in reference to the matter in question, which has directly contributed to the injury.

GANNON v. WILSON.

1886. 18 *Weekly Notes of Cases (Pennsylvania)*, 7.¹

ERROR to Common Pleas No. 1, of Philadelphia County.

Case, by William L. Wilson, Limited, against Edward Gannon, to recover damages for the destruction of certain terra-cotta drain-pipes.

The facts as they appeared on the trial were as follows: The plaintiff was the proprietor of a store, 507 Chestnut Street, Philadelphia, where he sold tiles and terra-cotta ware. A flight of steps came up from his cellar to the pavement of the street. Along this cellar-way was an iron railing. Beside this railing, next to the house, and not extending further out than the steps, or than four feet from the building, the plaintiff had put some pipe and wares for display. The defendant was the proprietor of a mail wagon. On the evening of the fourth of May, 1882, the driver of the wagon left the horse and wagon unhitched in the open alley-way adjoining the old post-office, on Chestnut Street below Fifth Street. The horse and wagon, without a driver, ran up Chestnut Street, on to the pavement in front of plaintiff's store, and crushed the wares of the plaintiff,—to recover damages for which this suit was brought.

The defendant offered in evidence an ordinance of the city of Philadelphia prohibiting the placing of wares upon any pavement, to show contributory negligence. Objected to by plaintiff. Objection sustained. Exception.

The Court charged, *inter alia*, as follows: "Where a horse and wagon are found running along, without a driver, upon the sidewalk of a public street, and injury to another person or his goods are caused by it, it is *prima facie* evidence of negligence on the part of the owner. . . . Even if the plaintiff violated an ordinance of the city in placing his wares on the sidewalk, that would not be such contributory negligence as would prevent him from recovering against the defendant in this case. The city might impose a fine as a penalty, but this is a question entirely between him and the city."

Verdict for plaintiff for \$90.36, and judgment thereon. The defendant thereupon took this writ, assigning as error the overruling of defendant's offer of evidence, and those portions of the judge's charge cited above.

H. W. Gimber, for plaintiff in error.

Samuel W. Pennypacker, for defendant in error.

THE COURT. We see no error in the rejection of the evidence, nor in the charge of the Court. If the defendant in error did violate an ordinance of the city, that violation was not a proximate cause of the

¹ Arguments omitted. — ED.

injury. It is the duty of the owner of a horse not to voluntarily permit it to run on the sidewalk of a public street. When so found he must rebut the presumption of negligence arising therefrom.

Judgment affirmed.

° **McGRATH v. MERWIN.**

1873. 112 *Massachusetts*, 467.

TORT for personal damage caused by the defendants' negligence.

At the trial in the Superior Court, the plaintiff offered to prove that on Sunday, June 24, 1871, while he was at work in a wheel-pit, used by the defendants, in connection with the machinery of extensive paper mills, and while he was in the exercise of due care he was hurt, by the negligence and carelessness of the defendants in setting the machinery and wheel in motion; that he was engaged in the work at the request of the defendants, gratuitously, and as a matter of kindness to them, it being unconnected with his ordinary work, and of no interest to him in any way, he not being an employee of the defendants; that the work he was doing consisted in digging the sand from the wheel-pit so as to enable a pump to be used to clear it of water, which frequently settled into the pit so as to impede the action of the wheel and of the machinery of the defendants' mills, it being necessary, whenever such impediments occurred, for the defendants to stop their work at a very large loss, and remove the water; that the defendants were doing a large business, which employed many hands and required the running of their mills from twelve o'clock Monday morning to twelve o'clock Saturday night, and that the work done on this occasion would obviate the necessity of stopping the machinery in future; that the defendants were present on this occasion with the plaintiff, directing how the work should be done, and that their meeting was by the previous arrangement of the parties.

Upon this offer of proof, Bacon, J., ruled that the action could not be maintained, and by consent of parties, before verdict, reported the questions of law to this Court. If the ruling was correct, the plaintiff is to become nonsuit; otherwise, the case is to stand for trial.

E. B. Gillett and H. B. Stevens, for the plaintiff.

G. M. Stearns, (*W. B. C. Pearsons and M. P. Knowlton* with him), for the defendants.

MORTON, J. The statute makes it unlawful to do "any manner of labor, business, or work, except works of necessity and charity," on the Lord's day. Gen. Sts. c. 84, § 1. The plaintiff's offer of proof discloses that he was at work in the defendants' wheel-pit, digging out the sand so as to enable a pump to be used to clear it of water which

frequently settled into the pit, so as to impede the action of the wheel, and that while so at work he was injured by the carelessness of the defendants in setting the wheel in motion. The only reason for doing the work on the Lord's day was, that the defendants were doing a large business, employing many hands, and "the work done on the occasion would obviate the necessity of stopping the machinery in future." The whole import of this is that it was more convenient and profitable to repair the wheel-pit on the Lord's day than it would be to do it on any secular day. This does not make it a work of necessity or charity within the exception of the statute. *Commonwealth v. Sampson*, 97 Mass. 407; *Commonwealth v. Josselyn*, 97 Mass. 411. The fact that the plaintiff was doing the work gratuitously, at the request of the defendants, does not take the case out of the letter or the spirit of the statute.

The decisions in this Commonwealth are numerous and uniform to the effect that the plaintiff, being engaged in a violation of law, cannot recover, if his own illegal act was an essential element of his case as disclosed upon all the evidence. The cases upon this subject are reviewed in *Myers v. Meinrath*, 101 Mass. 366; *Hall v. Corcoran*, 107 Mass. 251; and *Cranston v. Goss*, 107 Mass. 439.

The rules of law, as applied to actions of tort for injuries, like the case at bar, are, that if the illegal act of the plaintiff contributed to his injury, he cannot recover; but though the plaintiff at the time of the injury was acting in violation of law, if his illegal act did not contribute to the injury but was independent of it, he is not precluded thereby from recovering. Of the latter class are the cases, cited by the plaintiff, of *Spofford v. Harlow*, 3 Allen, 176; *Steele v. Burkhardt*, 104 Mass. 59; and *Kearns v. Sowden*, 104 Mass. 63. But the case at bar falls within the first named class of cases. The illegal act of the plaintiff was inseparably connected with the cause of action and contributed to his injury. The difference between the two rules may be illustrated by supposing the plaintiff, while engaged in his work, to have been assaulted by a stranger; he could maintain an action therefor, because his violation of law had no connection with the trespass. The two are contemporary facts, but the one has nothing to do with the other. He could show a complete cause of action independently of his own violation of law. But upon the facts of this case it is different. The plaintiff and defendant were engaged in a mutual, illegal work, and the accident which happened was one of the incidents and risks of the employment. The plaintiff was participating in an illegal work which led to the injury he sustained, and the law will not aid him to recover damages for the consequences of his own illegal act.

Plaintiff to be nonsuit.

WALLACE, SUPERINTENDENT OF THE WESTERN AND ATLANTIC RAILROAD, PLAINTIFF IN ERROR, v. MARY E. CANNON, DEFENDANT IN ERROR.

1868. 38 *Georgia*, 199.¹

ACTION by Mary E. Cannon, widow of Sylvester Cannon, an employee of the Western and Atlantic Railroad, because of his death by the alleged carelessness of the employees of the said railroad, July 6, 1862, while he was acting as engineer, on a train from Atlanta, Georgia, to Chattanooga, Tennessee.

Defendant pleaded, among other averments, that, at said time, the government of the State of Georgia, and superintendence, control, and management of the Western and Atlantic Railroad were in the hands of persons, inhabitants of Georgia, then engaged in insurrection against the Government of the United States, that, at said time, said Sylvester Cannon was, by acting and serving as engineer on said railroad, unlawfully aiding and abetting the enemies of the United States, because the persons with whom and under whom he was so acting and running were then engaged in acts of hostility, and were in insurrection against the United States, and because said Cannon was, as such engineer, assisting in the transportation of troops, knowingly and willingly, to wage war against the United States.

It was shown that Cannon was killed by a collision on said road, on Sunday, the 6th of July, 1862; that he was at the time acting as engineer of the train from Atlanta to Chattanooga, freighted with passengers, most of whom were Confederate soldiers, who had no guns but two or three cannon, besides horses and harness, and wore the Confederate uniform; two of the cars were passenger cars, twenty-one other cars carried the soldiers. The train was the regular mail train, which carried many letters and packages and military orders to the Confederate soldiers and generals; that the down train which collided with his was a freight train, which had been from Atlanta to Chattanooga, freighted with Confederate soldiers, and was then returning empty to Atlanta; that he had been ordered out that day by Col. Camden, the agent of the road at Chattanooga; that Cannon's train had been delayed because a certain turnout was too short to allow the passage of all trains that day; that this turnout had been sufficient before the war, but that the large amount of freight and soldiers that the road had to carry for the Confederate Government, so increased the number and length of the trains, that said turnout was then too short, and that Cannon was aware of this difficulty in passing; that the road was then in the habit of carrying Confederate soldiers, and there were so many of them, and so much freight for the Confederate Government, that much confusion was produced, yet, by

¹ Statement of facts abridged. Argument omitted. — Ed.

care and observance of the rules, the trains could have been run without collision. On the question of negligence, it was shown that Cannon was upon the road that day by order of the master machinist; that though behind his schedule time, he had been put back by the order of others, or the action of others getting in his way; that, being Sunday, it was unlawful for the freight train to be running; and that besides, he had passed all the regular down trains, and, by a rule of the road, it was provided that notice of any irregular train should be given by telegraph, and no such notice was given to Cannon's train. There was also evidence as to the rules, as to speed of trains, and as to the speed of Cannon's train at the time, and as to the age, character, and qualifications of Cannon, to show the *quantum* of damages due to his wife by reason of this loss.

The Court charged the jury, among other things, that it was necessary for plaintiff to show that said Cannon was killed by the running of the cars of the Western and Atlantic Railroad, and that without fault or negligence on his part, he being an employee of said road and engaged thereon, and as such, at the time; that the transportation of Confederate troops over the Western and Atlantic Railroad in 1862, for the purpose of making war upon the government or authorities of the United States, was contrary to the public policy and laws of the United States, and therefore illegal, and if Cannon was voluntarily engaged in the performance of acts in violation of the Constitution and laws of the United States when he was killed, and from that cause solely, or from the fault or negligence of said Cannon, at the time he lost his life, plaintiff could not recover; that if the killing resulted solely from the fault or negligence of defendant, or its employees, then plaintiff could recover.

The verdict was for \$5,000 in behalf of the plaintiff.

The defendant moved for a new trial, upon the grounds that the verdict was contrary to the evidence, &c., and because of the use of the "solely" in said charge in the two places where it occurs.

The Court refused a new trial, and this is assigned as error on the grounds aforesaid.

P. L. Mynatt, L. E. Bleckey, for plaintiff in error.

Robert Baugh, S. B. Hoyt, for defendant in error.

WARNER, J. This was an action brought by the widow of Sylvester Cannon, an employee of the Western and Atlantic Railroad, against that road, to recover damages for killing her husband, by the negligence of another employee of the road, under the provisions of the Code. On the trial of the case in the Court below, it was insisted that the plaintiff was not entitled to recover, because her husband, at the time he was killed, was voluntarily engaged in the unlawful act of transporting Confederate soldiers and munitions of war for the purpose of making war against the Government of the United States. If the husband of the plaintiff, at the time he was killed, and the other employees of the company, at the time of the injury, were voluntarily

engaged in transporting Confederate soldiers and munitions of war upon the road, for the purpose of making war upon the Government of the United States, such voluntary engagement, on their part, was an illegal act, in violation of the Constitution of the United States, the supreme law of the land. The Court below charged the jury in relation to this point in the case, "If you shall believe from the evidence in this case that the deceased was voluntarily engaged in the performance of acts in violation of the Constitution of the United States when he was killed, and from that cause solely, or from the fault or negligence of the said Sylvester at the time he lost his life, then the plaintiff is not entitled to recover. If the killing resulted solely from the fault or negligence of the defendant, or of an employee of the defendant, then the plaintiff is entitled to recover." This charge of the Court is excepted to, and assigned for error here.

The charge of the Court, so far as the same relates to the illegal employment of Cannon, and the other employees of the road, at the time of the injury, in view of the evidence in the record, was error. The question involved in that branch of the case was, whether the parties were voluntarily engaged, at the time of the injury, in an unlawful transaction, in violation of the Constitution and laws of the United States; that was a distinct ground of defence against the plaintiff's right to recover. The injury was caused by the collision of the two trains running upon the road. The evidence is, that Cannon's train was freighted with Confederate soldiers, two or three cannon, besides horses and harness, etc. Murphy testifies, "that in 1862 the road was in the habit of carrying Confederate soldiers; there were so many soldiers and so much freight of the Confederate Government, that a great deal of confusion was produced." Wing, the conductor on the down train, testifies, "that he had been carrying a load of Confederate soldiers to Chattanooga, and was returning with an empty train; that he was ordered out by Col. Camden, the agent of the road at Chattanooga." In view of the evidence contained in the record as to the illegal employment of the parties at the time the alleged injury occurred, the Court, in our judgment, should have charged the jury, that if they believed, from the evidence, that, at the time Cannon was killed by the collision of the railroad trains, the railroad company and the employees of that company (including Cannon, as well as the other employees, whose negligence caused the injury) were voluntarily engaged in the transportation of Confederate soldiers on the road for the purpose of making war upon the Government of the United States, then the plaintiff is not entitled to recover.

There was much said, on the argument of the case, about the down freight-train running on Sunday, in violation of the statute of this State. We do not recognize the doctrine that one offender against the law can set off against the plaintiff that he, too, is a public offender, in another distinct transaction. See *Mahony v. Cook*, 26 Pennsylvania R. 342; *The Philadelphia, Washington, & Baltimore*

Railroad Company v. The Philadelphia Steam Tow-boat Company, 23 Howard's U. S. R. 209. To bring the parties within the rule of the law applicable to such cases, they must both have been engaged in the same illegal transaction. It is [to] such cases only that the maxim of the law, *In pari delicto potior est conditio defendentis et possidentis*, applies. In all such cases the rule of the law is, to leave the parties where it finds them, giving no relief, and no countenance to claims of that character; not for the benefit of the defendant, but upon grounds of public policy. *Let the judgment of the Court below be reversed.*

BOSWORTH v. INHABITANTS OF SWANSEY.

1845. 10 *Metcalf*, 363.¹

THIS was an action on the Rev. Sts. c. 25, § 22, for an injury alleged to have been received by the plaintiff, by reason of a defect in a highway, in the town of Swansea, which said town was by law obliged to repair.

At the trial in the Court of Common Pleas, before Wells, C. J., it appeared that the injury set forth in the plaintiff's declaration was sustained by him, as therein alleged, on the 11th of June, 1843, being the Lord's day, in the forenoon of said day, as he was travelling from Warren (R. I.), where he resided, to Fall River, on business connected with the conduct of a cause then pending in the District Court of the United States in Rhode Island. The defendants admitted that they were by law bound to keep said highway in repair.

The judge instructed the jury, that the plaintiff would not be entitled to recover, unless he satisfied them that his travelling on the Lord's day was from necessity or for purposes of charity; that it being admitted that his business was of a secular character, the burden was upon him to show the necessity of transacting this business on the Lord's day.

The jury found a verdict for the defendants, and the plaintiff alleged exceptions to the judge's instructions.

Coffin, for plaintiff.

Battelle and E. Williams, for defendants.

SHAW, C. J. This was an action to recover damages against a town for a defect in their highway, by means of which the plaintiff sustained a loss. It appeared that the accident occurred on the Lord's day.

It has been repeatedly decided that, to maintain this action, it must appear that the accident was occasioned exclusively by the defect of the highway; to establish which, it must appear that the plaintiff himself is free from all just imputation of negligence or fault. *Smith v*

¹ Arguments omitted. — Ed.

Smith, 2 Pick. 621; *Howard v. North Bridgewater*, 16 Pick. 189. And in these and other cases, it has been held that the burden of proof is on the plaintiff, to prove affirmatively that he was so free from all fault. *Adams v. Carlisle*, 21 Pick. 146; *Lane v. Crombie*, 12 Pick. 177. The Court are of opinion that this case comes within this principle. The Rev. Sts. c. 50, § 2, provide that "no person shall travel on the Lord's day, except from necessity or charity," and that "every person so offending shall be punished by a fine, not exceeding ten dollars for every offence." The act of the plaintiff, therefore, in doing which the accident occurred, was plainly unlawful, unless he could bring himself within the excepted cases; and this would be a species of fault on his part, which would bring him within the principle of the cases cited. It would show that his own unlawful act concurred in causing the damage complained of. Then if he would bring himself within either of the exceptions, he must prove the fact which the statute makes an exception. In the case last above cited, *Lane v. Crombie*, the verdict was set aside, because the judge instructed the jury, that after the negligence of the defendants had been proved, if they relied on want of due care on the part of the plaintiff, the burden was upon them to prove it. This was held to be erroneous, and the burden was decided to be on the plaintiff to prove herself free from all fault. On this ground the verdict was set aside, although the evidence was such that probably the direction in regard to burden of proof had not much influence.

The Court are therefore of opinion that the instruction of the judge was right, that the burden of proof was on the plaintiff to show that his travelling on the Lord's day was from necessity or for purposes of charity.

What constitutes such necessity or purpose of charity, are questions not raised by the bill of exceptions. *Exceptions overruled.*

LYONS v. DESOTELLE.

1878. 124 *Massachusetts*, 387.¹

TORT for injuries to the plaintiff's horse caused by the alleged negligence of the defendant. Trial in the Superior Court, before Bacon, J., who allowed a bill of exceptions in substance as follows:—

It appeared in evidence that the plaintiff hired a horse and carriage on Sunday, August 1, 1875, for the purpose of going from Chicopee to Springfield, to attend a camp-meeting. Upon reaching the campground, the plaintiff hitched his horse at the side of the road behind the defendant's buggy, and the injury was caused by the defendant's

¹ Part of argument for plaintiff is omitted.—Ed.

horse backing the buggy against the plaintiff's horse. The evidence was conflicting as to whether this backing was caused by the defendant's negligence, or by his horse being suddenly frightened by a buffalo robe hanging from a seat of a passing wagon.

The defendant requested the judge to instruct the jury as follows :

" 1. If the jury believe that the accident happened through the negligence of the defendant, while the plaintiff was unlawfully travelling on the Lord's day, and that the accident would not have happened if the plaintiff had not been so travelling, he cannot recover.

" 2. If the plaintiff was travelling for pleasure on the Lord's day, and such travelling contributed to the injury which befell him, he cannot recover.

" 3. If the jury believe that the accident happened through the negligence of the defendant, not resulting from the wilful conduct of the defendant, while the plaintiff was unlawfully travelling on the Lord's day, the plaintiff cannot recover."

The judge refused so to instruct the jury, but did instruct them as follows : " It makes no difference whether the plaintiff was then in violation of the law relating to the Lord's day or not. If I am travelling on the wrong side of the road, contrary to law, and a man carelessly and negligently runs into me, I can recover, unless my carelessness contributed to the injury. If the plaintiff went up there for pleasure and received injuries by the defendant's negligence, he can recover, unless his own carelessness or negligence contributed to the injury." The judge gave general instructions on the matter of negligence, to which no exceptions were taken. The jury returned a verdict for the plaintiff, and found specially that the plaintiff did not go to the camp-meeting with a *bona fide* intention of attending religious services there. The defendant alleged exceptions.

C. L. Long, for the defendant.

G. D. Robinson, for the plaintiff.

1. The plaintiff was not travelling at the time of the injury to his horse. The illegal act, if any, was over, and he was as much entitled to recover, as if an assault had been committed personally upon him, after he had returned to his home.

2. If the plaintiff was in violation of law at the time, his act did not contribute to the injury in any legal sense, and he is entitled to recover. It is no answer to this position to say that the injury would not have happened if he had not been travelling. This is not what the law means by "contributing to the injury." Thus in *Welch v. Wesson*, 6 Gray, 505, the fact that the plaintiff was illegally trotting his horse against the defendant's horse was held not to prevent recovery for an injury caused by the defendant's wilfully running into him. So, driving on the wrong side of the street, or standing on a street, though acts in violation of law, do not prevent the plaintiff from recovering while so driving or standing. *Spoford v. Harlow*, 3 Allen, 176 ; *Steele v. Burkhardt*, 104 Mass. 59 ; *Kearns v. Sowden*,

104 Mass. 63, note. See also *Hall v. Ripley*, 119 Mass. 135. In all these cases the injury would not have happened had not the plaintiff been illegally where he was. *Smith v. Boston & Maine Railroad*, 120 Mass. 490, is not an authority against this position, for there, as stated by the judge delivering the opinion, it was conceded at the trial that the travelling of the plaintiff was a cause directly contributing to his injury.

MORTON, J. In an action of tort for injuries to the plaintiff's person or property, if his own illegal act or other negligence contributed to his injury, he cannot recover. But he is not precluded from recovering by the fact that he is at the time doing an illegal act, if such illegal act did not contribute to his injury. *McGrath v. Merwin*, 112 Mass. 467, and cases cited.

When a man in travelling sustains an injury from a defect in the highway or from an accidental collision with the vehicle of another traveller, his act of travelling is necessarily a contributing cause of the injury. If the act of travelling is unlawful, then his own unlawful act is a contributing cause of his injury, and prevents his recovery.

The statute prohibits any person from travelling "on the Lord's day, except from necessity or charity." Gen. Sts. c. 84, § 2. Whoever travels on the Lord's day, except from necessity or charity, is acting in violation of the law. Such act of travelling itself is unlawful, and if, in the course and as an incident of such travelling, the traveller sustains an injury, his unlawful act necessarily is a contributing cause of the injury. It has, therefore, been uniformly held in this Commonwealth that in such a case the plaintiff cannot maintain an action for his injury. *Smith v. Boston & Maine Railroad*, 120 Mass. 490, and cases cited.

In the case at bar, the defendant requested the Court to instruct the jury that "if the plaintiff was travelling for pleasure on the Lord's day, and such travelling contributed to the injury which befell him, he cannot recover." The Court refused this request, and instructed the jury that "it makes no difference whether the plaintiff was then in violation of the law relating to the Lord's day or not." The defendant was entitled to the instruction requested by him, and it was not covered by any of the instructions given. It is true that the Court instructed the jury, that "if the plaintiff went up there for pleasure and received injuries by the defendant's negligence, he can recover, unless his own carelessness or negligence contributed to the injury," implying that, if his own negligence contributed to the injury, he could not recover. But the whole instructions, taken in connection with the refusal to give the instruction requested, would naturally lead the jury to understand that if the unlawful act of the plaintiff in travelling on the Lord's day contributed to his injury, yet he could recover unless some other negligence on his part was a contributing cause.

A majority of the Court is therefore of opinion that the instructions were erroneous.

Exceptions sustained.

WHITE v. LANG.

1880. 128 *Massachusetts*, 598.

TORT, under the Gen. Sts. c. 88, § 59, to recover double the amount of damage alleged to have been caused by the defendant's dog. Answer, a general denial.

At the trial in the Superior Court, before Pitman, J., without a jury, it appeared that the plaintiff, on Sunday, April 8, 1877, was driving his horse and buggy along a public highway in the city of Boston; that, while so driving, the defendant's dog jumped at the head of the plaintiff's horse and frightened him so that he became unmanageable, ran, and overturned the buggy, whereby the same and other property of the plaintiff was damaged; and that, before the accident, the defendant knew of no mischievous or vicious propensity in the dog to attack or harass persons or animals.

The defendant offered evidence to show that the plaintiff was unlawfully travelling on the Lord's day, and not from necessity or charity; but the judge ruled that these facts would constitute no defence, or prevent the plaintiff from recovering; and found for the plaintiff in double the amount of damage sustained by him. The defendant alleged exceptions.

H. E. Ware, for the defendant.

E. T. Buss, for the plaintiff.

MORTON, J. We must assume, for the purposes of this case, that the plaintiff was unlawfully travelling on the Lord's day. But this fact does not defeat his right to recover, unless his unlawful act was a contributory cause of the injury he sustained. *McGrath v. Merwin*, 112 Mass. 467; *Marble v. Ross*, 124 Mass. 44, and cases cited. It has been held in this Commonwealth that if a person, who is unlawfully travelling on the Lord's day, is injured by a defect in the highway, or by a collision with the vehicle of another traveller, he cannot recover for the injury. This is upon the ground that his illegal act aids in producing the injury, or, in other words, is a contributory cause. *Lyons v. Desotelle*, 124 Mass. 387; *Connolly v. Boston*, 117 Mass. 64.

On the other hand, it has been held in several cases that if a person, who is at the time acting in violation of law, receives an injury caused by the wrongful or negligent act of another, he may recover therefor if his own illegal act was merely a condition, and not a contributory cause of the injury. *Marble v. Ross*, *ubi supra*; *Steele v. Burkhardt*, 104 Mass. 59; *Kearns v. Sowden*, 104 Mass. 63, note; *Spofford v. Harlow*, 3 Allen, 176.

We are of opinion that the case at bar falls within the last-named class. If a man while travelling is injured by an assault, the act of travelling cannot in any just sense be said to be a cause of the injury.

It is true that, if he were not travelling, he would not have received the injury, but the act of travelling is a condition and not a contributory cause of the injury. The plaintiff when travelling was assaulted and injured by a dog for whose acts the defendant is responsible. Gen. Sts. c. 88, § 59; *Le Forest v. Tolman*, 117 Mass. 109; *Sherman v. Favour*, 1 Allen, 191. The act of travelling had no tendency to produce the assault or the consequent injury; and therefore, though the plaintiff was travelling in violation of law, it does not defeat his right of recovery. *Exceptions overruled.*

WALLACE v. MERRIMACK RIVER NAVIGATION AND EXPRESS COMPANY.

1883. 134 *Massachusetts*, 95.

DEVENS, J. The plaintiff was sailing his yacht on the Lord's day, and thus travelling in violation of the Gen. Sts. c. 84, § 2, which permits this only for reasons of necessity or charity, none of which are assigned by him. He contends that he may recover upon the first count of his declaration, alleging that the defendant carelessly and negligently ran its steamboat into his yacht while thus sailing. Where the illegal act of a plaintiff contributes to the injury he receives from the carelessness of another, he cannot recover; but if his illegal act is independent of the injury, he is not thereby precluded from recovering, although at the time he was acting in violation of law. *McGrath v. Merwin*, 112 Mass. 467; *Lyons v. Desotelle*, 124 Mass. 387. The illegal act, although contemporaneous, is then a condition merely, and not a contributory cause of the injury. *White v. Lang*, 128 Mass. 598. But where one travelling on the highway in violation of law sustains injury by collision with the vehicle of another carelessly driven, his own illegal act is an essential element in the case as proved by him. *Lyons v. Desotelle*, *ubi supra*. No distinction can be made between travelers with their vehicles upon the highway and those who travel for pleasure in their boats upon the river. In either case, the act of him who unlawfully travels is not merely a circumstance attending the injury, but a cause contributing to its occurrence. The plaintiff has therefore no just ground of complaint on account of the ruling of the presiding judge, that he could not maintain his action upon the first count of his declaration.

There was evidence in the case tending to show that the defendant was a common carrier of passengers, but the question whether the facts would present a case such as contemplated by the terms of the St. of 1877, c. 232, and whether that would have any application, was not raised at the trial, nor is it here considered.

The second count of the plaintiff's declaration alleges, not a careless

and negligent act on the part of the defendant in running down his boat, but a wanton and malicious one. Upon such a state of facts, although the plaintiff was in violation of the law forbidding travelling upon the Lord's day, his title to an action would be independent of his unlawful act. He would not therefore forfeit the general protection of the law, and the injury in such supposed case would proceed solely from the wrongful act of the defendant. *Kidder v. Dunstable*, 11 Gray, 342; *Smith v. Gardner*, 11 Gray, 418; *Counter v. Couch*, 8 Allen, 436; *Welch v. Wesson*, 6 Gray, 505; *Spofford v. Harlow*, 3 Allen, 176; *Damon v. Scituate*, 119 Mass. 66; *Smith v. Conway*, 121 Mass. 216. [Remainder of opinion omitted.¹]

New trial upon second count.

W. S. Knox, for plaintiff.

W. F. Gile, for defendant.

• SUTTON v. TOWN OF WAUWATOSA.

1871. 29 *Wisconsin*, 21.²

APPEAL from County Court for Milwaukee County.

Action against a town to recover damages for injuries to plaintiff's cattle, caused by the breaking down of a defective bridge which they were crossing.

The plaintiff started from Columbus on a Friday morning with a drove of about fifty cattle, intending to take them to Milwaukee, and sell them. Stopping at Hartland over Saturday night, he resumed his journey on Sunday morning, and at about four o'clock, P. M., reached a public bridge of about seventy-two feet span, over the Menomonee River, in the town of Wauwatosa. The cattle were driven upon the bridge, and when the greater part of them were near the middle of the span the stringers broke, some twelve feet from the abutments at each end, and precipitated the structure, with the cattle upon it, into the river, causing the death of some, severely injuring others, and rendering the remainder for a time unsalable.

The complaint alleges, that the injury was caused by the dangerous, unsafe, and rotten condition of the bridge, and the neglect of the defendant to keep it in proper repair.

The answer denies the negligence charged to the defendant, and alleges that the cattle were driven upon the bridge in so careless and

¹ Section 1, Chapter 37, Mass. Statutes of 1884, is as follows: "The provisions of chapter ninety-eight of the Public Statutes relating to the observance of the Lord's day shall not constitute a defence to an action for a tort or injury suffered by a person on that day."

² The arguments are omitted; also that part of the opinion which relates to the question of contributory negligence. — Ed.

negligent a manner as to cause it to break ; and, also, that they were so driven upon the bridge on Sunday.

After hearing the evidence on the part of the plaintiff, the Court granted a nonsuit, on the ground that the plaintiff, being in the act of violating the statute prohibiting the doing of secular business on Sunday, when the injury occurred, could not recover therefor. The plaintiff appealed.

Jenkins and Elliott, for appellant.

C. K. Martin, Palmer, Hooker, and Pitkin, for appellee.

DIXON, C. J. It is very clear that the plaintiff, in driving his cattle along the road and over the bridge, to a market, on Sunday, was at the time of the accident in the act of violating the provisions of the statute of this State, which prohibits, under a penalty not exceeding two dollars for each offence, the doing of any manner of labor, business, or work on that day, except only works of necessity or charity, R. S., c. 183, § 5. It was upon this ground the nonsuit was directed by the Court below, and the point thus presented, that the unlawful act of the plaintiff was negligence, or a fault on his part contributing to the injury, and which will preclude a recovery against the town, is not a new one ; nor is the law, as the Court below held it to be, without some adjudications directly in its favor, and those by a judicial tribunal as eminent and much respected for its learning and ability as any in this country. *Bosworth v. Swansey*, 10 Met. 363 ; *Jones v. Andover*, 10 Allen, 18. A similar, if not the very same principle has been maintained in other decisions of the same tribunal. *Gregg v. Wyman*, 4 Cush. 322 ; *May v. Foster*, 1 Allen, 408. But in others still, as we shall hereafter have occasion to observe, the same learned Court has, as it appears to us, held to a different and contradictory rule in a class of cases which it would seem ought obviously to be governed by the same principle. The two first above cases were in all material respects like the present, and it was held there could be no recovery against the towns. In the first, the opinion, delivered by Chief Justice Shaw, and which is very short, commences with a statement of the proposition, repeatedly decided by that Court, " that to maintain the action it must appear that the accident was occasioned exclusively by the defect of the highway ; to establish which. it must appear that the plaintiff himself is free from all just imputation of negligence or fault." The authorities to this proposition are cited, and the statute against the pursuit of secular business and travel on the Lord's day then referred to, and the opinion proceeds : " The act of the plaintiff, therefore, in doing which the accident occurred, was plainly unlawful, unless he could bring himself within the excepted cases ; and this would be a species of fault on his part which would bring him within the principle of the cases cited. It would show that his own unlawful act concurred in causing the damage complained of." This is all of the opinion touching the point under consideration.

In the next case there was a little, and but a little, more effort at reasoning upon the point. The illustrations on page 20, of negligence

in a railway company in omitting to ring the bell of the engine, or to sound the whistle at the crossing of a highway, and of the traveller on the wrong side of the road with his vehicle at the time of the collision, and the language of the Court alluding to such "conduct of the party as contributing to the accident or injury which forms the groundwork of the action," very clearly indicate the true ground upon which the doctrine of contributory negligence, or want of due care in the plaintiff, rests, but it is not shown how or why the mere violation of a statute by the plaintiff constitutes such ground. Upon this point the Court only say: "It is true that no direct unlawful act of omission or commission by the plaintiff, done at the moment when the accident occurred, and tending immediately to produce it, is offered to be shown in evidence. But it is also true that, if the plaintiff had not been engaged in the doing of an unlawful act, the accident would not have happened, and the negligence of the defendants in omitting to keep the road in proper repair would not have contributed to produce an injury to the plaintiff. It is the disregard of the requirements of the statute by the plaintiff which constitutes the fault or want of due care, which is fatal to the action." It would seem from this language that the violation of the statute by the plaintiff is regarded only as a species of remote negligence, or want of proper care on his part, contributing to the injury.

The two other cases above cited were actions of tort by the owners, to recover damages from the bailees for injuries to personal property loaned and used on Sunday, — horses loaned and immoderately driven on that day. They were decided against the plaintiffs, and chiefly on the ground of the unlawfulness of the act of loaning or letting on Sunday of the horses, to be driven on that day in violation of the statute, which the plaintiffs themselves were obliged to show, and the doctrine of *par delictum* was applied. It was in substance held in each case that the plaintiff, by the first wrong committed by him, had placed himself *in pari delicto* with the defendant, with respect to the subsequent and distinct wrong committed by the latter, and the actions were dismissed upon the principle that the law will not permit a party to prove his own illegal acts in order to establish his case.

In direct opposition to the above decisions are the numerous cases decided by the Courts of other States, the Supreme Court of the United States, and the Courts of Great Britain, which have been so diligently collected and ably and forcibly presented in the brief of the learned counsel for the present plaintiff. Of the cases thus cited, with some others, we make particular note of the following: *Woodman v. Hubbard*, 5 Foster, 67; *Mohney v. Cook*, 26 Penn. 342; *Norris v. Litchfield*, 35 N. H. 271; *Corey v. Bath*, id. 530; *Merritt v. Earle*, 29 N. Y. 115; *Bigelow v. Reed*, 51 Maine, 325; *Hamilton v. Goding*, 55 id. 428; *Baker v. The City of Portland*, 58 id. —; *Kerwhacker v. Railway Co.*, 3 Ohio St. 172; *Phila., &c. Railway Co. v. Phila., &c. Tow Boat Co.*, 23 How. (U. S.) 209; *Bird v. Holbrook*, 4 Bing. 628; *Barnes v. Ward*, 9 M. G. & S. 420.

It seems quite unnecessary, if indeed it were possible, to add anything to the force or conclusiveness of the reasons assigned in some of these cases in support of the views taken and decisions made by the Courts. The cases may be summed up and the result stated generally to be the affirmance of two very just and plain principles of law as applicable to civil actions of this nature, namely: first, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of; and, secondly, that the fault, want of due care or negligence on the part of the plaintiff, which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it. Under the operation of the first principle, the defendant cannot exonerate himself or claim immunity from the consequences of his own tortious act, voluntarily or negligently done to the injury of the plaintiff, on the ground that the plaintiff has been guilty of some other and independent wrong or violation of law. Wrongs or offences cannot be set off against each other in this way. "But we should work a confusion of relations, and lend a very doubtful assistance to morality," say the Court in *Mohney v. Cook*, "if we should allow one offender against the law, to the injury of another, to set off against the plaintiff that he too is a public offender." Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the State, and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defence should be allowed to prevail. It would extend the maxim, *ex turpi causa non oritur actio*, beyond the scope of its legitimate application, and violate the maxim, equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong, and to visit unmerited and over-rigorous punishment upon the plaintiff, constitute the sole motive for such defence on the part of the person making it. In the cases of the horses let to be driven on Sunday, so far as the owners were obliged to resort to an action on the contract which was executory and illegal, of course there could be no recovery; but to an action of tort, founded not on the contract, but on the tort or wrong subsequently committed by the defendant, the illegality of the contract furnished no defence, as is clearly demonstrated in *Woodman v. Hubbard*, and the cases there cited. The decisions under the provision of the constitution of this State abolishing imprisonment for debt arising out of or founded on a contract express or implied, and some others in

this Court, strongly illustrate the same distinction. *In re Mowry*, 12 Wis. 52, 56, 57; *Cotton v. Sharpstein*, 14 Wis. 229, 230; *Schennert v. Koehler*, 23 Wis. 523, 527.

And as to the other principle, that the act or conduct of the plaintiff which can be imputed to him as a fault, want of due care or negligence on his part contributing to the injury, must have some connection with the injury as cause to effect, this also seems almost too clear to require thought or elaboration. To make good the defence on this ground, it must appear that a relation existed between the act or violation of law on the part of the plaintiff, and the injury or accident of which he complains, and that relation must have been such as to have caused or helped to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events as one event is known to precede or follow another. It must have been some act, omission, or fault naturally and ordinarily calculated to produce the injury, or from which the injury or accident might naturally and reasonably have been anticipated under the circumstances. It is obvious that a violation of the Sunday law is not of itself an act, omission, or fault of this kind, with reference to a defect in the highway or in a bridge over which a traveller may be passing, unlawfully though it may be. The fact that the traveller may be violating this law of the State, has no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day, and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it or the question of contributory negligence is concerned. In this respect it would be wholly immaterial also that the traveller was within the exceptions of the statute, and travelling on an errand of necessity or charity, and so was lawfully upon the highway.

The mere matter of time, when an injury like this takes place, is not in general an element which does or can enter at all into the consideration of the cause of it. Time and place are circumstances necessary in order that any event may happen or transpire, but they are not ordinarily, if they ever are, circumstances of cause in transactions of this nature. There may be concurrence or connection of time and place between two or three or more events, and yet one event not have the remotest influence in causing or producing either of the others. A traveller on the highway, contrary to the provisions of the statute, yet peaceably and quietly pursuing his course, might be assaulted and robbed by a highwayman. It would be difficult in such case to perceive how the highwayman could connect the unlawful act of the traveller with his assault and robbery so as to justify or excuse them, or how it could be said, that the former had any natural or legitimate tendency to cause or produce the latter. It is true, it might be said, if the traveller had not been present at that particular time or place, he would not

have been assaulted and robbed, but that too might be said of any other assault or robbery committed upon him ; for if his presence at one time and place be a fault or wrong on his part, contributing to the assault and robbery in the nature of cause to effect, it must be equally so at every other time and place, and so always a defence in the mouth of the highwayman. Every highwayman must have his opportunity by the passing of some traveller, and so some one must pass over a rotten and unsafe bridge or defective highway before any accident or injury can happen from that cause. Connection, therefore, merely in point of time, between the unlawful act or fault of the plaintiff, and the wrong or omission of the defendant, the same being in other respects disconnected and independent acts or events, does not suffice to establish contributory negligence or to defeat the plaintiff's action on that ground. As observed in *Mohney v. Cook*, such connection, if looked upon as in any sense a cause, whether sacred and mysterious or otherwise, clearly falls under the rule *causa proxima non remota spectatur*.

"The cause of an event," says Appleton, C. J., in *Moulton v. Sanford*, 51 Maine, 134, "is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily that condition is usually termed the cause, whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event."

In the present case the weight of the same cattle, upon the same bridge, either the day before or the day after the event complained of, when the plaintiff would have been guilty of no violation of law in driving them, would most unquestionably have produced the same injurious result. And if, on that day even, the driving had been a work of necessity or charity, as if the city of Milwaukee had been in great part destroyed by fire, as Chicago recently was, and great numbers of her inhabitants in a condition of helplessness and starvation, and the plaintiff hurrying up his drove of beef cattle for their relief, no one doubts the same accident would then have happened, and the same injuries have ensued. The law of gravitation would not then have been suspended, nor would the rotten and defective stringers have refused to give way under the superincumbent weight, precisely as they did do on the present occasion. There are many other violations of law, which the traveller or other person passing along the highway may, at the time he receives an injury from a defect in it, be in the act of committing, and which are quite as closely connected with the injury, or the cause of it, as is the violation of which complaint is made against the present plaintiff. He may be engaged in cruelly beating or torturing his horse, or ox, or other animal ; he may be in the pursuit of game, with intent to kill or destroy it, at a season of the year when this is prohibited ; he may be exposing game for sale, or have it in his possession, when these are unlawful : he may be in the act of committing

an assault, or resisting an officer ; he may be fraudulently passing a toll gate, without paying his toll ; and he may be unlawfully setting or using a net or seine, for the purpose of catching fish, in an inland lake or stream.

All of these are acts prohibited by the same chapter or statute in which we find the prohibition from work and labor on Sunday, and some of them under the same, but most under a greater penalty than is prescribed for that offence, thus showing the character or degree of culpability which was variously attached to them in the opinion of the legislature. And there are many other minor offences, *mala prohibita* merely, created by statute, which might be in like manner committed. There are in Massachusetts, and doubtless in many of the States, statutes against blasphemy and profane cursing and swearing, the prevention of which seems to be equally if not more an object of solicitude and care on the part of the legislature, than the prevention of labor, travel, or other secular pursuits on Sunday, because more severely punished. It has not yet transpired, we believe, even in Massachusetts, that the action of any person to recover damages for an injury sustained by reason of defects in a highway, has been peremptorily dismissed because he was engaged at the time in profane cursing or swearing, or because he was in a state of voluntary intoxication, likewise prohibited under penalty by statute.

It is obvious that the breaking down of a bridge from the rottenness of the timbers, or their inability to sustain the weight of the person or of his horses and carriage, could not be affected by either of these circumstances, and yet, on the principle of the decisions above referred to in that State, it is not easy to see why the action must not be dismissed. On principle there could be no discrimination between the cases, and it could make no difference in what the unlawful act of the plaintiff consisted at the time of receiving the injury. We must reject the doctrine of those cases entirely and adopt that of the other cases cited, and which is well expressed by the Supreme Court of Maine, in *Baker v. Portland*, 58 Maine, 199, 204, as follows : " The defendant's counsel contends that the simple fact that the plaintiff is in the act of violating the law, at the time of the injury, is a bar to the right of recovery. Undoubtedly there are many cases where the contemporaneous violation of the law by the plaintiff is so connected with his claim for damages as to preclude his recovery : but to lay down such a rule as the counsel claims, and disregard the distinction in the ruling of which he complains, would be productive oftentimes of palpable injustice. The fact that a party plaintiff in an action of this description was at the time of the injury passing another wayfarer on the wrong side of the street, or without giving him half the road, or that he was travelling on runners without bells, in contravention of the statute, or that he was smoking a cigar in the street, in violation of municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travellers, if the commission

of the plaintiff's offence did not in any degree contribute to produce the injury of which he complains."

Strong analogy is afforded and much weight and force of reason bearing upon this question are found in some of the cases which have arisen upon life policies, and as to the meaning and effect to be given to the condition usually contained in them, exempting the company from liability in case the assured "shall die in the known violation of any law," &c., and it has been held that the violation must be such as is calculated to endanger life, by leading to acts of violence against, or to the bodily or personal injury or exposure of, the assured, and so to operate in producing his death in the connection of cause to effect. See opinions in *Bradley v. Mutual Benefit Life Ins. Co.*, 45 N. Y. 422.

In the case of *Clemens v. Clemens*, recently decided by this Court, it became necessary to consider the same question, though under different circumstances, as to what violation of law on the part of the plaintiff would bar his action in a Court of justice and leave him remediless in the hands of an overreaching and dishonest antagonist, and the views there expressed are not without their relevancy and adaptation to the question as here presented. In that case, this Court adopted the rule of law as settled in Massachusetts, favoring the remedy of the plaintiff, against the opposite rule sustained by the adjudications in some of the other States, and consistency of decision seems now clearly to require that our action should be reserved with respect to the rule established by the cases here referred to. The inconsistency upon general principle between these decisions of the same learned Court and those there relied upon and adopted, will, we think, be readily perceived and conceded when carefully examined and considered in connection with each other.

Judgment reversed, and a venire de novo awarded.¹

¹ In *Johnson v. Town of Irasburgh*, 47 Vermont, 28 (A. D. 1874), the Supreme Court of Vermont, while agreeing with the reasoning in *Sutton v. Wauwatosa*, on the question of causation, nevertheless reached the same result as in *Bosworth v. Swansey*, holding that the plaintiff was not entitled to recover. This conclusion was arrived at upon grounds which were not discussed in the above Wisconsin and Massachusetts cases. The very able opinion of Ross, J., upon this point (47 Vermont, 35-38), may be summarized as follows:—

The liability of the town for the insufficiency of the highway is purely statutory. The duty to travellers imposed by the statute is only a duty to that class of travellers who have the right to pass, to those who are legally travelling. The legislature did not intend to impose a duty upon towns "in behalf of a person who was forbidden to use all highways for the purposes of travel, and at a time when he was so forbidden to use them. Can he be a traveller within the purview of the statute who is forbidden to travel?" The duty and liability "are co-extensive with the purposes for which persons can legitimately use the highways, and no greater." "The plaintiff when injured was forbidden by law to use the highway, and by reason thereof the defendant town owed him no duty to provide any kind of a highway, and therefore was under no liability for any insufficiency in any highway."

NEWCOMB v. BOSTON PROTECTIVE DEPARTMENT.

1888. 146 *Massachusetts*, 596.

TORT for personal injuries occasioned to the plaintiff, a cab-driver, by a collision between the cab and a wagon of the defendant.

At the trial in the Superior Court, before Blodgett, J., evidence was introduced tending to show that the defendant was incorporated under the St. of 1874, c. 61,¹ for the protection of life and property at fires in the city of Boston, and that the collision occurred while one of its wagons, with its regular complement of men, was responding to a fire alarm; that the wagon was proceeding along Washington Street in a northerly direction; that the cab, upon which the plaintiff was sitting, was one of several cabs standing in a line upon the easterly side of Washington Street between the easterly track of a street railway and the curbstone; that the plaintiff's cab and horse were not drawn up lengthwise of the street and as near as possible to the curbstone, but that the horse was facing the sidewalk at an angle so that the body of the cab projected eighteen or twenty inches into the street beyond the line of the other cabs; and that the wagon of the defendant was driven negligently into the cab, causing the accident.

The defendant asked the judge to instruct the jury as follows:—

“1. If the plaintiff, at the time of the accident, was violating the ordinance of the city of Boston, to wit, ‘Every owner, driver, or other person having the care and ordering of a vehicle shall, when stopping in a street, place his vehicle and the horse or horses connected therewith lengthwise with the street, as near as possible to the sidewalk,’ that was an unlawful act, and he cannot recover in this action. 2. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action. 3. Under section 3, chapter 61, of the Acts of 1874, ‘The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston,’ said defendant is not liable for an accident caused by the collision of one of its teams, while going to a fire, with a vehicle standing in the streets, in violation of either of the city ordinances. 4. If the plaintiff, at the time of the action, was violating the ordinance of the city of Boston, to wit,

¹ Section 3 of this statute is as follows:—

“The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston, subject to such rules and regulations as the city council and the fire commissioners may prescribe, and subject also to the rights of the Boston Fire Department; and any violation of the street rights of the Boston Protective Department shall be punished in the same manner as is provided for the punishment of violations of the rights of the Boston Fire Department in chapter three hundred and seventy-four of the acts of eighteen hundred and seventy-three.”

‘ Every driver of a vehicle shall remain near it while it is unemployed or standing in a street, unless he is necessarily absent in the course of his duty and business, and he shall so keep his horse or horses and vehicle as not to obstruct the streets,’ that was an unlawful act, and he cannot recover in this action. 5. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action.”

The judge refused to give these instructions, but instructed the jury as to the effect of a violation of the ordinance as to the position of a vehicle and horse while standing in a street, stating that the rule was applicable to both ordinances as follows : —

“ Bearing in mind the provision of the regulation as to the position of a vehicle when not in motion, I instruct you as to the law, that if, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part ; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was violating a city ordinance necessarily shows negligence that contributed to the injury. Whether the position of the plaintiff’s horse and carriage, in violation of an ordinance, did or did not contribute to the injury, is a question of fact for the jury ; and in determining this question, the jury will take into consideration all the surrounding facts and circumstances. . . . The plaintiff must prove that his position was not so carelessly taken as to contribute to the collision ; and the fact that his position was in violation of the ordinance is not conclusive proof of negligence which contributed to the injury. Or, stating the general rule in a somewhat different form, the fact that the plaintiff is engaged in violating the law does not prevent him from recovering damages of the defendant for an injury which the defendant could have avoided by the exercise of ordinary care, unless the unlawful act contributed proximately to produce the injury. . . . If, applying these rules, you are of the opinion that there was no negligence, in other words, no carelessness, on the part of the plaintiff, which directly contributed to the injury, then the plaintiff is entitled to maintain this action, if he proves another proposition ; and as to that, the burden is upon him. And that proposition is, that the defendant’s servants, in the care and management of this wagon, at the time the plaintiff was injured, were negligent.”

The jury returned a verdict for the plaintiff ; and the defendant alleged exceptions.

R. M. Morse, Jr., for the defendant.

W. Gaston and C. L. B. Whitney, for the plaintiff.

KNOWLTON, J. The plaintiff brought his action to recover for injuries received while sitting upon his cab, from the negligent driving of a wagon against it by a servant of the defendant corporation. There was evidence tending to show that, at the time of the accident, he was

violating an ordinance of the city of Boston, by waiting in a street without placing his vehicle and horse lengthwise with the street, as near as possible to the sidewalk, and that this illegal conduct contributed to the injury. There was evidence applicable in like manner to another similar ordinance, which requires every driver of a vehicle standing in a street so to keep his horse or horses and vehicle as not to obstruct the streets.

As to the alleged violation of each of these ordinances, the defendant asked the Court to instruct the jury as follows: "If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action." The presiding judge declined to give this instruction, and gave none which we deem to be equivalent to it. He instructed the jury in these words: "If, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was violating a city ordinance necessarily shows negligence that contributed to the injury." In another part of the charge it was indirectly intimated that, if the plaintiff's unlawful act contributed proximately to produce the injury, he could not recover, but it was nowhere expressly stated.

The question before us then is, whether or not the defendant was entitled to this instruction, — in other words, whether, if the plaintiff's unlawful act contributed to cause his injury, it was a bar to his recovery, or merely evidence of negligence which might or might not bar him, according to the view which the jury should take of his conduct as a whole, in its relation to the accident.

It has often been held that a violation of law at the time of an accident, by one connected with it, is evidence of his negligence, but not conclusive. *Hanlon v. South Boston Horse Railroad*, 129 Mass. 310; *Hall v. Ripley*, 119 Mass. 135; *Damon v. Scituate*, 119 Mass. 66. In recent times a large number of penal statutes have been enacted, in which the legislature has seen fit to punish acts which are not *mala in se*, and sometimes when in a given case there is no actual criminal intent. On grounds of public policy, laws have been passed under which a person is bound to know the facts in regard to the subject with which he is dealing, when under possible circumstances ignorance would not be inconsistent with proper care. One who sells milk must know that it is not adulterated. An unlicensed person must know that what he sells is not intoxicating liquor. *Commonwealth v. Boynton*, 2 Allen, 160. And if in a possible case he trespasses in innocent ignorance, the law gives him no relief. He can only appeal to the sense of justice and the discretion of the public authorities to save him from the punishment which the law would inflict. It is obvious that in suits for negligence, if the contributing conduct of the plaintiff is to be con-

sidered as a whole, it may sometimes be found that he has not been guilty of actual negligence or fault, although he has violated the law. One element of his action may be neglect of a duty prescribed by a statute, when there are other concurring elements which show that his course was entirely justifiable.

As a general rule, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. But, for reasons which will presently appear, illegal conduct of a plaintiff directly contributing to the occurrence on which his action is founded, is an exception to this rule. Such illegality may be viewed in either of two aspects: looking at the transaction to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simply in reference to the violated law, the act may be tried solely by the test of that law. In the latter aspect it wears a hostile garb, and an inquiry is at once suggested, whether the plaintiff, as a transgressor of the law, is in a position to obtain relief at the hand of the law. In the first view, the illegal conduct comes within the general rule just stated; in the second, it does not. This distinction has not always been observed. A plaintiff's violation of law has usually been discussed in connection with the subject of due care.

In *Bosworth v. Swansey*, 10 Met. 363, Chief-Justice Shaw, after referring to the rule that a plaintiff must be free from "imputation of negligence or fault," says, in reference to unlawful travelling on the Lord's day, "This would be a species of fault on his part, which would bring him within the principle of the cases cited."

In *Jones v. Andover*, 10 Allen, 18, Chief-Justice Bigelow says, "The term 'due care,' as usually understood, in cases where the gist of the action is the negligence of the defendant, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject-matter or transaction which constitutes the cause of action."

In *Steele v. Burkhardt*, 104 Mass. 59, an action for negligence in driving against the plaintiffs' horse, which was left standing in a street in violation of an ordinance, Chief-Justice Chapman considers the general subject of the plaintiffs' due care, and then treats particularly the contention of the defendant that the plaintiffs were compelled to prove their violation of law in order to establish their case.

McGrath v. Merwin, 112 Mass. 467, was an action founded on the defendant's alleged negligence in starting the machinery of a mill, while the plaintiff was at work in the wheel-pit making repairs on the Lord's day, and Mr. Justice Morton, in delivering the opinion, deals with the case solely upon the principle that Courts will not aid a plaintiff whose action is founded upon his own illegal act, and says, "The decisions in this Commonwealth are numerous and uniform to the effect

that the plaintiff, being engaged in a violation of law, cannot recover, if his own illegal act was an essential element of his case as disclosed upon all the evidence." He further states the rule in such cases to be, that, "if the illegal act of the plaintiff contributed to his injury, he cannot recover; but though the plaintiff at the time of the injury was acting in violation of law, if his illegal act did not contribute to the injury, but was independent of it, he is not precluded thereby from recovering."

In *Davis v. Guarnieri*, 45 Ohio St. 470, Owen, C. J., states, as the second of three considerations upon which the doctrine of contributory negligence is founded, "the principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong."

No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary. *Hall v. Ripley*, 119 Mass. 135; *Banks v. Highland Street Railway*, 136 Mass. 485; *Tuttle v. Lawrence*, 119 Mass. 276, 278; *Lyons v. Desotelle*, 124 Mass. 387; *Heland v. Lowell*, 3 Allen, 407; *Steele v. Burkhardt*, 104 Mass. 59; *Damon v. Scituate*, 119 Mass. 66; *Marble v. Ross*, 124 Mass. 44; *Smith v. Boston & Maine Railroad*, 120 Mass. 490. And it is quite immaterial whether or not a plaintiff's unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from recovering on the ground that the Court will not lend its aid to one whose violation of law is the foundation of his claim. *Hall v. Corcoran*, 107 Mass. 251.

While this principle is universally recognized, there is great practical difficulty in applying it. The best minds often differ upon the question whether, in a given case, illegal conduct of a plaintiff was a direct and proximate cause contributing with others to his injury, or was a mere condition of it; or, to state the question in another way, appropriate to the reason of the rule, whether or not his own illegal act is an essential element of his case as disclosed upon all the evidence. Upon this point it is not easy to reconcile the cases. It has been unanimously decided that in *Gregg v. Wyman*, 4 Cush. 322, there was error in holding a plaintiff's illegal conduct to be an essential element of his case, when in fact it was merely incidental to it. *Hall v. Corcoran*, *ubi supra*. But whatever criticisms may have been made upon the decisions or the assumptions in certain cases, that illegal action of a plaintiff contributed to the result, or was to be treated as a concurring cause, or upon language in disregard of the distinction between a cause and a condition, there has been none upon the doctrine that, when a plaintiff's illegal conduct does directly contribute to his injury, it is fatal to his recovery of damages. *Baker v. Portland*, 58 Maine, 199; *Norris v. Litchfield*, 35 N. H. 271; *Sutton v. Wauwatosa*, 29 Wis. 21.

The plaintiff relies with great confidence upon the case of *Hanlon v. South Boston Horse Railroad*, 129 Mass. 310, in which the presiding judge at the trial refused to rule, that, "if the defendant was driving at a rate of speed prohibited by the ordinance of the city of Boston, and this speed contributed to the injury, this fact would itself constitute negligence on the part of the defendant, and would entitle the plaintiff to recover if he was in the exercise of due care," and his refusal was held right by this Court. In giving the opinion, after pointing out that driving at a rate of speed forbidden by the ordinance might have occurred without fault of the driver, and might have been justified by circumstances authorizing the jury to find that there was no negligence, Mr. Justice Colt said, "It is not true that, if an unlawful rate of speed contributed to the injury, that alone would give the plaintiff a right to recover, if he was without fault." There are intimations, without adjudication, to the same effect, in *Wright v. Malden & Melrose Railroad*, 4 Allen, 283, and in *Lane v. Atlantic Works*, 111 Mass. 136. See also *Kirby v. Boylston Market Association*, 14 Gray, 249; *Heeney v. Sprague*, 11 R. I. 456; *Brown v. Buffalo & State Line Railroad*, 22 N. Y. 191; *Flynn v. Canton Co.*, 40 Md. 312.

But there is nothing in the language used in *Hanlon v. South Boston Horse Railroad* inconsistent with the principle which we have already stated. That decision related to the liability of a defendant. It may be, where a penal statute does not purport to create a civil liability, or to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages, unless his act, when viewed in connection with all the attendant circumstances, appears to be negligent or wrongful. And at the same time Courts may well hold that, in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression will receive no favor.

The instruction requested in the case at bar would have become applicable only upon a finding by the jury that the plaintiff's unlawful act contributed to cause the injury. The jury may have so found; and we are of opinion that upon such a finding, irrespective of the question whether viewed in all its aspects his act was negligent or not, the Court could not properly permit him to recover. The instruction, therefore, should have been given.

The Court rightly refused the instruction requested, that the plaintiff could not recover if at the time of the accident he was violating the ordinance, and so doing an unlawful act. This request ignored the distinction between illegality which is a cause, and illegality which is a condition of a transaction relied on by a plaintiff, or between that which is an essential element of his case when all the facts appear, and that which is no part of it, but only an attendant circumstance. The position of a vehicle, which has been struck by another, may or may not have been one of the causes of the striking. Of course it could not have been struck if it had not been in the place where the blow came.

But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly and proximately produces, or helps to produce, a result as an efficient cause, and that which is a necessary condition or attendant circumstance of it. If the position of the plaintiff's vehicle was such as, in connection with ordinary and usual concurring causes, would naturally produce such an accident, that indicates that it contributed to it. But even in that case, external causes may have been so exclusive in their operation, and so free from any relation to the position of the vehicle, as to have left that a mere condition, without agency in producing the result. What is a contributing cause of an accident is usually a question for a jury, to be determined by the facts of the particular case; and such it has been held to be in many cases like the one before us. *Damon v. Scituate*, 119 Mass. 66; *Hall v. Ripley*, 119 Mass. 135; *Welch v. Wesson*, 6 Gray, 505; *Spofford v. Harlow*, 3 Allen, 176; *White v. Lang*, 128 Mass. 598; *Baker v. Portland*, 58 Maine, 199; *Norris v. Litchfield*, 35 N. H. 271; *Sutton v. Wauwatosa*, 29 Wis. 21.

The defendant's third request for an instruction was rightly refused, for reasons which have already been stated. The statute referred to does not relieve the defendant from liability for negligence to a plaintiff whose unlawful act or want of due care does not contribute to his injury. In the opinion of a majority of the Court the entry must be —

Exceptions sustained.

CHAPTER III.

NEGLIGENCE IN RELATIONS NOT ARISING DIRECTLY OUT OF
CONTRACT.—STANDARD OF CARE.—DEGREES OF CARE.

o

BLYTH v. BIRMINGHAM WATERWORKS CO.

1856. 11 *Exchequer*, 781.

THIS was an appeal by the defendants against the decision of the judge of the County Court of Birmingham. The case was tried before a jury, and a verdict found for the plaintiff for the amount claimed by the particulars. The particulars of the claim alleged, that the plaintiff sought to recover for damage sustained by the plaintiff by reason of the negligence of the defendants in not keeping their water-pipes and the apparatus connected therewith in proper order.

The case stated that the defendants were incorporated by stat. 7 Geo. IV., c. cix., for the purpose of supplying Birmingham with water.

By the 84th section of their Act it was enacted, that the company should, upon the laying down of any main-pipe or other pipe in any street, fix, at the time of laying down such pipe, a proper and sufficient fire-plug in each such street, and should deliver the key or keys of such fire-plug to the persons having the care of the engine-house in or near to the said street, and cause another key to be hung up in the watch-house in or near to the said street. By sec. 87, pipes were to be eighteen inches beneath the surface of the soil. By the 89th section, the mains were at all times to be kept charged with water. The defendants derived no profit from the maintenance of the plugs distinct from the general profits of the whole business, but such maintenance was one of the conditions under which they were permitted to exercise the privileges given by the Act. The main-pipe opposite the house of the plaintiff was more than eighteen inches below the surface. The fire-plug was constructed according to the best known system, and the materials of it were at the time of the accident sound and in good order. The apparatus connected with the fire-plug was as follows:—

The lower part of a wooden plug was inserted in a neck, which projected above and formed part of the main. About the neck there was a bed of brickwork puddled in with clay. The plug was also enclosed in a cast iron tube, which was placed upon and fixed to the brickwork. The tube was closed at the top by a movable iron stopper having a

hole in it for the insertion of the key, by which the plug was loosened when occasion required it.

The plug did not fit tight to the tube, but room was left for it to move freely. This space was necessarily left for the purpose of easily and quickly removing the wooden plug to allow the water to flow. On the removal of the wooden plug the pressure upon the main forced the water up through the neck and cap to the surface of the street.

On the 24th of February, a large quantity of water, escaping from the neck of the main, forced its way through the ground into the plaintiff's house. The apparatus had been laid down twenty-five years, and had worked well during that time. The defendants' engineer stated, that the water might have forced its way through the brickwork round the neck of the main, and that the accident might have been caused by the frost, inasmuch as the expansion of the water would force up the plug out of the neck, and the stopper being incrustated with ice would not suffer the plug to ascend. One of the severest frosts on record set in on the 15th of January, 1855, and continued until after the accident in question. An incrustation of ice and snow had gathered about the stopper, and in the street all round, and also for some inches between the stopper and the plug. The ice had been observed on the surface of the ground for a considerable time before the accident. A short time after the accident, the company's turn-cock removed the ice from the stopper, took out the plug, and replaced it.

The judge left it to the jury to consider whether the company had used proper care to prevent the accident. He thought, that, if the defendants had taken out the ice adhering to the plug, the accident would not have happened, and left it to the jury to say whether they ought to have removed the ice. The jury found a verdict for the plaintiff for the sum claimed.

Field, for the appellant. There was no negligence on the part of the defendants. The plug was pushed out by the frost, which was one of the severest ever known.

The Court then called on

Kennedy, for the respondent. The company omitted to take sufficient precautions. The fire-plug is placed in the neck of the main. In ordinary cases the plug rises and lets the water out; but here there was an incrustation round the stopper, which prevented the escape of the water. This might have been easily removed. It will be found, from the result of the cases, that the company were bound to take every possible precaution. The fact of premises being fired by sparks from an engine on a railway is evidence of negligence: *Piggott v. Eastern Counties Railway Company*, 3 C. B. 229 (E. C. L. R. vol. 54); *Aldridge v. Great Western Railway Company*, 3 M. & Gr. 515 (Id. 42), 4 Scott, N. R. 156, 1 Dowl. N. S. 247, s. c. [MARTIN, B. I held, in a case tried at Liverpool, in 1853, that, if locomotives are sent through the country emitting sparks, the persons doing so incur all the

responsibilities of insurers; that they were liable for all the consequences.¹ I invited counsel to tender a bill of exceptions to that ruling. Water is a different matter.] It is the defendants' water, therefore they are bound to see that no injury is done to any one by it. An action has been held to lie for so negligently constructing a hayrick at the extremity of the owner's land, that, by reason of its spontaneous ignition, his neighbor's house was burnt down: *Vaughan v. Menlove*, 3 Bing. N. C. 468 (E. C. L. R. vol. 32). [BRAMWELL, B. In that case discussions had arisen as to the probability of fire, and the defendant was repeatedly warned of the danger, and said he would chance it.] He referred to *Wells v. Ody*, 1 M. & W. 452. [ALDERSON, B. Is it an accident which any man could have foreseen?] A scientific man could have foreseen it. If no eye could have seen what was going on, the case might have been different; but the company's servants could have seen, and actually did see, the ice which had collected about the plug. It is of the last importance, that these plugs, which are fire-plugs, should be kept by the company in working order. The accident cannot be considered as having been caused by the act of God: *Siordet v. Hall*, 4 Bing. 607 (Id. 13).

ALDERSON, B. I am of opinion that there was no evidence to be left to the jury. The case turns upon the question, whether the facts proved show that the defendants were guilty of negligence. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against which no reasonable man can provide. The result was an accident, for which the defendants cannot be held liable.

MARTIN, B. I think that the direction was not correct, and that there was no evidence for the jury. The defendants are not responsible, unless there was negligence on their part. To hold otherwise would be to make the company responsible as insurers.

BRAMWELL, B. The Act of Parliament directed the defendants to lay down pipes, with plugs in them, as safety-valves, to prevent the

¹ See *Lambert v. Bessey*, T. Raym. 422; *Scott v. Shepherd*, 3 Wils. 403. Probably an action of trespass might have been brought.

bursting of the pipes. The plugs were properly made, and of proper material; but there was an accumulation of ice about this plug, which prevented it from acting properly. The defendants were not bound to keep the plugs clear. It appears to me that the plaintiff was under quite as much obligation to remove the ice and snow which had accumulated, as the defendants. However that may be, it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened.

Verdict to be entered for the defendants.

• REX v. WILLIAM SMITH, ET ALS.

1826. 2 Carrington & Payne, 449.¹

THE first count of the indictment alleged, in substance, that George Smith was an idiot, and under the care, custody, and control of the respondents, William, Thomas, and Sarah Smith; that the respondents assaulted said George; that they unlawfully kept, confined, and imprisoned him in a dark, cold, and unwholesome room; that they unlawfully neglected and refused to give sufficient victuals and clothing; and that they kept him without sufficient and proper air, warmth, and exercise necessary for his health; whereby the said George became weak and sick.

There were also counts alleging George to be under the care, custody, and control of William Smith; and other counts not alleging that he was in the care of any person.

Plea, not guilty.

From the evidence on the part of the prosecution, it appeared that George Smith, who was upwards of forty years of age, had always been an idiot, and had been bedridden for some years; and that his father, at his decease, had left him an annuity charged on his real property. The defendants were the brothers and sister of George Smith; and in consequence of some information, the Rev. W. D. Broughton, a magistrate, and other persons, went to the house of William Smith in the month of January, 1826, and saw the other defendants; they asked to see the idiot, and were told by Sarah Smith, in the presence of Thomas Smith, that he was locked up, and that W. Smith, who was absent, had the key. However, Mr. Broughton, and those who accompanied him, went upstairs, and on opening a door, which was not locked, they found George Smith on a bed of chaff, covered with a blanket and a great coat. The window of the room

¹ Statement condensed; part of argument omitted. — Ed.

was bricked up and the floor of it in a filthy state; and though the weather was extremely cold, there was no appearance that there had been any fire in the room. From this place he was conveyed to the Stafford Lunatic Asylum, where his limbs were found to be in a contracted state, so that he could not stand or move about.

Campbell, for defendants. The present indictment states, that this idiot was in the care, custody, and control of the defendants. Now, a child is in the care of its parent, and that raises a duty to provide for it; but the relation of brother and brother does not raise any such duty, and for this purpose the parties were absolute strangers. How can George Smith be said to be under the care, custody, or control of either of the defendants? An idiot may be as helpless as a child of tender years; but George Smith was more than twenty-one years of age, and there is nothing to show that there was a duty raised in any other to take care of him. The indictment alleges that they kept him in a dark, unwholesome room, and neglected and refused to administer to him sufficient meat, drink, &c. for his support, and did keep him without proper air, &c. All this is non-feasance, and there is not the slightest evidence of malfeasance, and certainly no evidence of any assault. There may be evidence that he was not properly taken care of. If he had been found a lunatic, and the defendants had been his committees, that would raise a duty in them to take care of him. But if a person is alleged to be an idiot, it may be the duty of his nearest relations to take care of him; but that would be what the moralists call a duty of imperfect obligation. To support any of the counts except the last it must be shown that, either by contract or by law, there was a duty in the defendants to maintain and take care of their brother. If they did not maintain their brother could any action be brought against them? Certainly not. Now, can there be a case of any breach of duty where no action is maintainable. The duty can only arise by contract or by act of law. The former there is no pretence for, and as to the latter, he was not their child nor were they his committees.

Whateley, on the same side. To support this indictment, it is not sufficient that there should be a moral obligation in the defendants to maintain this unfortunate person, but there must be a legal one, such as arises from the relation of parent and child, or husband and wife, or master and servant.

Taunton, for the prosecution. It is said in this case that there was no legal obligation on the defendants. I submit that there was; and unfortunate would be the situation of such wretched beings if there were not. A brother may not be bound to take care of a brother if the father be living; but if two brothers and a sister have received as an inmate another brother who is an idiot, and have, in point of fact, that brother under their care and control, though this was in the first instance voluntary, the law throws on them the necessity of taking proper care of him.

Russell, on the same side. Mr. Campbell has said that there is no

legal obligation between brother and brother. Suppose a father to die and leave two sons, one thirty years old, the other two; and if, by the neglect of the elder, the younger died while residing in his house, would he not be answerable for murder? Indeed, if it were not so any one on whom the care of a lunatic or infant brother devolved might get his money improperly, and then starve him to death with impunity.

Campbell, in reply. The question is, whether there was a legal obligation on the defendants, for mere non-feasance is only indictable when there is a liability and a neglect of a duty. In malfeasance a positive act is done. Mr. Justice Lawrence made the distinction in the broadest way in the case of *Rex v. Ridley*. In that case there was non-feasance and malfeasance, and the learned judge expressly distinguishes between the two. The defendants are said to have had George Smith in their care, custody, and control; now there is no evidence that they were his committees, or that they were under any legal liability to maintain him. And further, how does it at all appear that they had any right to prevent his going away? If the people at the lunatic asylum had persuaded George Smith to leave the house, the defendants could have brought no action against them for getting him away. So far from that, could not the defendants have carried him to the workhouse? Nay, if they had been hard-hearted enough, they might have insisted on his going there.¹

BURROUGH, J. I am clearly of opinion that, on the facts proved, there is no assault and no imprisonment in the eye of the law, and all the rest of the charge is non-feasance. In the case of *Squires* and his wife for starving the apprentice, the husband was convicted, because it was his duty to maintain the apprentice, and the wife was acquitted, because there was no such obligation on her. I expected to have found in the will of the father that the defendants were bound, if they took the father's property, to maintain this brother; but under the will they are only bound to pay him £50 a year, and not bound to maintain him. William Smith appears to have been the owner of the house, and Thomas and Sarah were mere inmates of it, as their idiot brother might be; as to these latter, there could clearly be no legal obligation on them; and how can I tell the jury that either of the defendants had such a care of this unfortunate man as to make them criminally liable for omitting to attend to him. There is strong proof that there was some negligence; but my point is, that omission without a duty will not create an indictable offence. There is a deficiency of proof of the allegation of care, custody, and control, which must be

¹ It is worthy of remark, that the stat. 43 Eliz. c. 2, which enacts, that the father, grandfather, mother, grandmother, and children of a poor person being of sufficient ability, shall maintain such poor person, under penalty of 20s. for every month they shall fail to do so, does not extend to one brother maintaining another. So that if a man were in a workhouse his brother would not be compellable to contribute anything towards his support, however able to do so.

taken to be legal care, custody, and control. Whether an indictment might be so framed as to suit this case, I do not know; but on this indictment I am clearly of opinion that the defendants must be acquitted.

Verdict — Not guilty.

REGINA v. JUSTAN.

Feb. 4, 1893. 37 Solicitors' Journal, 251.

High Court. — Queen's Bench Division.

THE prisoner was indicted at the Worcester Assizes for manslaughter. The question reserved by Day, J., for the opinion of the Court was whether, under the circumstances, there was an implied undertaking or duty on the part of the prisoner to attend to the wants of the deceased. The prisoner was a woman between thirty and forty years of age, and had no means of her own. The deceased, a woman of about seventy-three years of age, was the prisoner's aunt. For some time previous to the commission of the alleged offence the prisoner had been living with the deceased in her cottage, and had been maintained by her; no other person lived with or attended to them. The deceased shortly before her death suffered from gangrene in her leg, which rendered her during the last ten days of her life quite unable to attend to herself, or to move about, or to do anything to procure assistance. The prisoner continued to live in the house at the cost of the deceased, and took in the food supplied by the tradespeople but did not appear to have given any to the deceased, and certainly did not give or procure any medical or other attendance, or give notice to any person of the condition of the deceased, although she had abundant opportunity to do so, there being neighbors living in adjoining houses, and relations of the deceased living within a few miles. The medical evidence showed that death was substantially accelerated by neglect and want of food, nursing, and medical attendance. It was contended on behalf of the prisoner that there was no evidence of any legal duty such as would bind the prisoner to give or procure any food, or nursing, or medical attendance, or to give notice to anyone that such was required. The judge directed the jury that if they thought there was an implied undertaking by the prisoner in respect of these matters they might convict the prisoner of manslaughter. The jury found the prisoner guilty, and the judge reserved this case. It was argued on behalf of the prisoner that no such duty existed between persons of full age, and that there was no evidence of any undertaking by the prisoner, express or implied. *R. v. Friend*, R. & R. 20; *R. v. Shepherd*, Leigh & Cave, 147; and *R. v. Marriott*, 8 C. & P. 425, were cited.

The judgment of the Court (LORD COLERIDGE, C. J., HAWKINS, CAVE, DAY, and COLLINS, JJ.) was delivered by

LORD COLERIDGE, C. J. We are all of opinion that this conviction must be affirmed. It would not be correct to say that every moral duty is also a legal duty, but it is correct to say that every legal duty is founded upon a moral duty. In this case it is clear that it was the moral duty of this woman at least to impart to the deceased so much of the food which she took into the house, and which was paid for by the money of the deceased, as was necessary to sustain her life. The deceased could only get the food through the instrumentality of the prisoner. The prisoner failed to discharge this duty, and

there is no doubt that her failure to discharge it accelerated the death of the deceased. There is no case directly in point, but it would be a slur upon the English law if it were not clear that this case falls within the principle of the decisions. There was here a legal duty deliberately unperformed, and that assisted in causing death. That, in my opinion, and in the opinion of my brethren, is sufficient to show that this conviction was correct, and ought to be affirmed.

Conviction affirmed.

Vachell, at the request of the judge, argued the case on behalf of the prisoner. The prosecution was not represented.

SMITH v. TRIPP.

1880. 13 *Rhode Island*, 153.

TRESPASS ON THE CASE. On demurrer to the declaration.

DURFEE, C. J. The declaration, which contains only one count, alleges that "said city of Providence heretofore, to wit on the day of _____, A. D. 1874, and from thence hitherto by its agents, officers, and servants so carelessly and negligently kept and maintained that highway in said city known as Traverse Street, at and near its intersection with Sheldon Street, and so carelessly and negligently suffered and allowed said Traverse Street to be and remain out of repair, as wrongfully and injuriously to turn and cause to flow upon the lands and estate of the plaintiff, next adjoining to said Traverse Street, the water which otherwise and ordinarily, or naturally, and but for the wrongful acts and omissions of the said city and its agents, officers, and servants aforesaid, would not have flowed or run upon the plaintiff's lands and estate aforesaid, whereby," &c., concluding with a specification of damages.

The defendant demurs and contends that no cause of action is duly set forth. We think he is right. The requisites of a good declaration in an action for negligence are well stated by Willes, J., in *Gautret v. Egerton*, L. R. 2 C. P. 371, 374. "It ought," he says, "to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others." So too it is not enough to state a relation from which the duty may arise, under certain circumstances, but, unless the duty necessarily results from the relation, the circumstances which give rise to it must likewise be stated. *Brown v. Mallett*, 5 C. B. 599; *Seymour v. Maddox*, 16 Q. B. 326; *Wilson v. Newberry*, L. R. 7 Q. B. 31; *Collis v. Selden*, L. R. 3 C. P. 495; *Williams v. Hingham, &c. Turnpike Company*, 4 Pick. 341, 345. The declaration here does not come up to these requirements. The mere

existence of a highway does not make it the duty of the town or city where the highway is to keep the water flowing in it from overflowing on the adjoining lands. Such a duty devolves on a town or city only when the town or city has done something to increase the volume of the water, or to accumulate it in unusual quantities at some particular point of the highway. The declaration does not allege that the city of Providence has done this.

The plaintiff contends that it is enough for him to allege that the injury was caused by neglect to keep the highway in repair, and that it is not necessary to set forth the particular facts, because the duty of keeping its highways in repair is a public duty imposed on the city by statute. In our opinion the argument is fallacious. The duty which the statute imposes is a duty to keep the highways in repair, not so that the water will not flow from them upon adjoining lands, but so that they will be safe and convenient for travellers. The declaration does not allege any neglect of duty in this respect, and if it did allege a neglect of duty in this respect, and also allege that in consequence of it water flowed from the highway upon the plaintiff's land, nevertheless it would not show any cause of action; because the only action which could be maintained against the city for neglecting to keep the street safe and convenient for travel is an action for injury suffered in consequence of the street's being unsafe and inconvenient *for travel*, and not for injury suffered by the overflow of surface water from the street, for that would be no less a legal than a logical irrelevancy. In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute, and that he would not have been injured if the duty had been performed; but he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his security from the injury. *O'Donnell v. The Providence & Worcester Railroad Co.*, 6 R. I. 211.

We do not perceive that the case at bar is in any material respect distinguishable from the case of *Wakefield v. Newell*, 12 R. I. 75, in which a demurrer to a similar declaration was sustained.

Demurrer sustained.

James Tillinghast, for plaintiff. '

Nicholas Van Slyck, City Solicitor, for defendant.

o VAUGHAN v. MENLOVE.

1837. 3 *Bingham's New Cases*, 468.¹

THE declaration alleged, in substance, that plaintiff was the owner of two cottages; that defendant owned land near to the said cottages; that defendant had a rick or stack of hay near the boundary of his land which was liable and likely to ignite, and thereby was dangerous to the plaintiff's cottages; that the defendant, well knowing the premises, wrongfully and negligently kept and continued the rick in the aforesaid dangerous condition; that the rick did ignite, and that plaintiff's cottages were burned by fire communicated from the rick or from certain buildings of defendant's which were set on fire by flames from the rick.

Defendant pleaded the general issue; and also several special pleas, denying negligence.

At the trial it appeared that the rick in question had been made by the defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire; that though there were conflicting opinions on the subject, yet during a period of five weeks the defendant was repeatedly warned of his peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

Patterson, J., before whom the cause was tried, told the jury that the question for them to consider was, whether the fire had been occasioned by gross negligence on the part of the defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained, on the ground that the jury should have been directed to consider, not whether the defendant had been guilty of a gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion, but whether he had acted *bonâ fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The action under such circumstances was of the first impression.

Talfourd, Serjt., and *Whately*, showed cause.

The pleas having expressly raised issues on the negligence of the defendant, the learned judge could not do otherwise than leave that ques-

¹ Statement abridged. — ED.

tion to the jury. The declaration alleges that the defendant knew of the dangerous state of the rick, and yet negligently and improperly allowed it to stand. The plea of not guilty, therefore, puts in issue the scienter, it being of the substance of the issue: *Thomas v. Morgan*, 2 Cr. M. & R. 496. And the action, though new *in specie*, is founded on a principle fully established, that a man must so use his own property as not to injure that of others. On the same circuit a defendant was sued a few years ago for burning weeds so near the extremity of his own land as to set fire to and destroy his neighbors' wood. The plaintiff recovered damages, and no motion was made to set aside the verdict. Then, there were no means of estimating the defendant's negligence, except by taking as a standard the conduct of a man of ordinary prudence: that has been the rule always laid down, and there is no other that would not be open to much greater uncertainties.

R. V. Richards, in support of the rule.

First, there was no duty imposed on the defendant, as there is on carriers or other bailees, under an implied contract, to be responsible for the exercise of any given degree of prudence: the defendant had a right to place his stack as near to the extremity of his own land as he pleased, *Wyatt v. Harrison*, 3 B. & Adol. 871: under that right, and subject to no contract, he can only be called on to act *bonâ fide* to the best of his judgment; if he has done that, it is a contradiction in terms, to inquire whether or not he has been guilty of gross negligence. At all events what would have been gross negligence ought to be estimated by the faculties of the individual, and not by those of other men. The measure of prudence varies so with the varying faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence. In *Crook v. Jadis*, 5 B. & Adol. 910, Patterson, J., says, "I never could understand what is meant by parties taking a bill under circumstances which ought to have excited the suspicion of a prudent man:" and Taunton, J., "I cannot estimate the degree of care which a prudent man should take."

[Remainder of argument omitted.]

TINDAL, C. J. I agree that this is a case *primæ impressionis*; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like, where the bailee is responsible in consequence of the remuneration he is to receive: but there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequence of his own neglect: and though the defendant did not himself light the fire, yet mediately he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbor, he is liable to an action for the amount of injury done, unless the accident

were occasioned by a sudden blast which he could not foresee. *Turber-vill v. Stamp*, 1 Salk. 13. But put the case of a chemist making experiments with ingredients, singly innocent, but when combined liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbor, can any one doubt that an action on the case would lie?

It is contended, however, that the learned judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the defendant had acted honestly and *bonâ fide* to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various: and though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs v. Bernard*, 2 Ld. Raym. 909. Though in some cases a greater degree of care is exacted than in others, yet in "the second sort of bailment, viz., *commodatum* or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse." The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

[Concurring opinions were delivered by PARK, and VAUGHAN, JJ. GASELEE, J. concurred in the result.] *Rule discharged.*

MEREDITH v. REED.

1866. 26 *Indiana*, 334.

APPEAL FROM THE WAYNE COMMON PLEAS.

GREGORY, C. J. Meredith sued Reed before a justice for an injury done by a stallion of the latter to the mare of the former, resulting in the death of the mare. Jury trial, verdict for the defendant; motion for a new trial overruled and judgment. The evidence is in the record. The facts are substantially as follows: In May, 1865, the defendant owned a stallion, which had previously been let to mares, but owing to the sickness of the owner, was not so let during the spring of 1865. He was a gentle stallion, and had never been known by the owner to be guilty of any vicious acts. Not being in use, he had been kept up in a stable for four or five months. He was secured in the stable by a strong halter and chain fastened through an iron ring in the manger. The stable door was securely fastened on the inside by a strong iron hasp, passed over a staple, and a piece of chain passed two or three times through the staple over the hasp, and the ends firmly tied together with a strong cord. It was also fastened on the outside by a piece of timber, one end of which was planted in the ground, while the other rested against the door. The horse was thus secured on the day and night the injury occurred. The gate of the enclosure surrounding the stable was shut and fastened as usual. About 11 o'clock that night the horse was found loose on the highway, and did the injury complained of. Early the following morning the outside gate was found open; the stable door was found open, with the log prop lying some distance to one side, and the chain which had been passed through the staple was gone, and the cord with which it had been tied was found cut and the pieces lying on the floor.

There are forty-two alleged errors assigned, but many of them are not, in our opinion, so presented as to entitle them to consideration in this Court. So far as the substantial rights of the appellant are involved, all the questions properly presented resolve themselves into the inquiry as to the nature and extent of the liability of the owner of a domestic animal for injuries done by it to the personal property of another, disconnected from any trespass to real estate.

It is contended, on the one hand, that ordinary care was all the law required of the defendant in this case. On the other it is claimed that the utmost care was necessary to free him from liability. Ordinary care is all that the law required in the case in judgment. What is ordinary care in some cases would be carelessness in others. The law regards the circumstances surrounding each case, and the nature of the animal or machinery under control. Greater care is required to be taken of a stallion than of a mare; so in the management of a steam-engine, greater care is necessary than in the use of a plow.

Yet it is all ordinary care ; such care as a prudent, careful man would take under like circumstances. The degree of care is always in proportion to the danger to be apprehended. The case at bar was properly sent to the jury, and the verdict is fully sustained by the evidence.

The judgment is affirmed, with costs.

W. A. Bickle, for appellant.

J. P. Siddall and *C. H. Burchenal*, for appellee.

The scope of this book does not permit a full presentation of cases upon the vexed question of "degrees of care." The cases containing the fullest discussion are either actions of contract or cases which, though in form actions of tort, yet arise so directly out of contract that the law allows the plaintiff his election to sue either in contract or tort. How far such cases can aid, either as direct authorities or by way of analogy, in establishing a rule for cases of tort wholly disconnected with contract, is a question deserving more consideration than it has yet received.

Speaking generally, it may be said that there are three theories as to degrees of care:—

1. That there are three degrees of care, — great, ordinary, and slight.
2. That there are two degrees of care, — that due from a specialist, and that due from a non-specialist.
3. That there are no degrees of care, — there being only one legal standard for all cases, viz. ordinary care under the circumstances; a standard varying in fact but not in law.

The diverse views on this subject are illustrated by the following extracts and references:—

1 SHEARMAN AND REDFIELD ON NEGLIGENCE, 4TH ED., SECTION 47.

§ 47. *Three degrees of care defined.* — Our conclusion is, therefore, that three degrees of care are and should be recognized and enforced by the law of modern times, to wit:—

(1) Slight care, which is the care usually bestowed upon the matter in hand by persons having no special knowledge of, or experience in, such matters, but having the average prudence of that general class of society to which the person whose conduct is in question belongs.

(2) Ordinary care, which is the care usually bestowed upon the matter in hand by persons accustomed to deal with such matters and having the average prudence of the general class of society to which the person whose conduct is in question belongs. If the matter is one of business, ordinary care also implies the possession and use of such knowledge and experience, with respect to similar matters, as is usually possessed by men of good business habits in that line.

(3) Great care, which is the care usually bestowed upon the matter in hand by the most competent, conscientious, prudent, and careful class of persons engaged in the business to which such matters belong, no matter how few such persons may be, if they are numerous enough to have a recognized existence as a class.

In every case it must be understood, as an essential part of the definition, that the test applied is the kind of care usually exercised by persons of the class referred to, under circumstances similar to those of the case under con-

sideration,¹ where their own interests are to be protected from a similar injury, and when they honestly intend to be careful. What they do, or omit to do, when in a careless or reckless mood, is never any standard by which to judge.

HORACE SMITH ON NEGLIGENCE, 2D ED., 11-14.

The Romans divided duties into three classes, (1) for the benefit of the performer, (2) for the benefit of both parties, (3) for the benefit of the performee. Thus, (1) Where the transaction in respect of which the duty arose was for the benefit of the person performing it, it was considered that, as it was to be done for his advantage alone, and he was to derive benefit from another, he ought to take the greatest care not to injure that other; and he was therefore held liable for *culpa levis*, or slight neglect. (2) Where the transaction out of which the duty arose was for the benefit of both parties, it was considered that the person performing the duty should take ordinary and reasonable care; and he was therefore held liable for *culpa*. (3) Lastly, where the transaction out of which the duty arose was for the sole benefit of another, and the person performing it would derive no benefit from it, it was considered that the person performing it was not bound to exercise much care; and he was therefore held not liable, except for *culpa lata*.²

Different writers have divided these sorts of negligence in different manners, some insisting that there are only two sorts of negligence—*culpa levis* and *culpa lata*; others dividing the subject into three sorts—*culpa lata*, *culpa* (including *culpa levis*), and *culpa levissima*; ³ but it seems upon the whole to be held in the English courts ⁴ and in the American courts ⁵ that there

¹ This branch of the definition applies to all the degrees of care. *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; affirming s. c. 6 Duer, 633; Field, J., *Parrot v. Wells*, 15 Wall. 524; Willes, J., *Vaughan v. Taff Vale R. Co.*, 5 Hurlst. & N. 679; *Kay v. Pennsylvania R. Co.*, 65 Penn. St. 269; *Pennsylvania R. Co. v. Coon*, 111 Id. 430; *Grant v. Ludlow*, 8 Ohio St. 1; *Cleveland, &c. R. Co. v. Terry*, Id. 570, 581; *Fallon v. Boston*, 3 Allen, 38; *Fletcher v. Boston & Maine R. Co.*, 1 Id. 9, 15; *Holly v. Boston Gas Co.*, 8 Gray, 123, 131. "Negligence is want of care under the circumstances. No fixed rule of duty, applicable to all cases, can be established. A course of conduct justly regarded as resulting from the exercise of ordinary care under some circumstances, would exhibit the grossest negligence under other circumstances; the opportunity for deliberation and action, the degree of danger, and many other considerations of like nature, affect the standard of care which may be reasonably required in a particular case:" Sterrett, J., in *Pennsylvania R. Co. v. Coon*, *supra*. "Gross negligence is a relative term. It is, doubtless, to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it means the absence of the care that was requisite under the circumstances:" Davis, J., *Milwaukee, &c. R. Co. v. Arms*, 91 U. S. 494. See *Steamboat New World v. King*, 16 How. (U. S.) 469.

² But in case of mandate, even where for the benefit of another, he was by the Roman law liable for *culpa*, or even, perhaps, for *culpa levis*; for, said the Roman law, he has undertaken a gratuitous service and must perform it. Campbell, s. 11; Wharton, s. 493, and, as pointed out by Mr. Wharton, s. 500, the gratuitous mandatory must, according to our law, bring that amount of skill to the execution of his services which he has undertaken to show.

³ See Campbell, p. 4.

⁴ See Campbell, s. 14. (He divides obligations into four classes; but one of them is "absolute assurance," which is really outside of the subject.) Shearman, Ch. II., s. 16.

⁵ See this view discussed by Wharton, s. 57.

are three sorts of negligence, and it has been held that sometimes persons are liable for slight negligence, sometimes for ordinary negligence, and sometimes for gross negligence; and it will be found impossible not to advert to these terms, which were in the Roman law really co-ordinate to the distinctly different kind of duty which was to be performed, and which will be found constantly used in the English cases.

The truth is that the words "gross," "ordinary," and "slight,"¹ however useful in the simpler classification of the Roman law, and used with the more exact precision of the Latin language, have become vague and misleading in the English cases and text-books, and, indeed, are sometimes used merely to express strong feeling with respect to the particular action being tried. It is submitted that the best test of whether an act is culpably negligent in the particular case is to inquire whether there was a duty to exercise ordinary care, or something more or less than ordinary care, incumbent upon the party, and whether he had reasonably fulfilled that duty; if he has, he is not negligent; if he has not, he is negligent. The words "ordinary" and "reasonably" are no doubt vague, but the subject is only further obscured by the introduction of the words "gross" and "slight," because nobody can really say what they mean, though anybody may easily give to them some peculiar or exaggerated meaning.²

The sort of care to be taken depends upon the duty or position of the party, and is a question of law; the amount of care to be taken depends upon circumstances, and is a question of fact. If a person gives me a glass jug and a deal box to carry, the sort of care which I have to exercise depends upon my position with respect to that person, *e. g.*, am I paid by him or not; but the amount of care (whatever the sort of care may be) will differ, and be probably greater in respect of the glass jug than of the deal box.

The subject will, therefore, be divided in the next three chapters into —

1. Neglect of duties requiring ordinary care.
2. Neglect of duties requiring skill, or an extraordinary amount of care.
3. Neglect of duties requiring less than ordinary care.³

¹ It may be noticed that the word "slight" is not exactly "*levis*," which is "light," and that the word "gross" is not exactly "*lata*," and that in each instance the English word is too strong, and in fact, as is usual in English, more vigorous and picturesque than accurate. The word "gross" seems to approach the Latin "*dolus*," which denotes intentional wrong, and is outside of our subject; and the word "slight" approaches to that "*culpa levissima*" which is sometimes spoken of negligence, but amounts to "*casus*," or accident.

² See judgment of Lord Chelmsford in *Gibbin v. McMullen*, L. R. 2 P. C. 317.

³ See Mr. Beale's article in 5 Harvard Law Review, pp. 222-231, maintaining (*inter alia*) the following positions:—

The rights and duties growing directly out of gratuitous undertakings are not properly classed under rights *ex contractu* or rights *ex delicto*; but constitute in themselves a distinct class. The degree of care required of an undertaker is not proportionate to the reward; and hence the fact that a duty was undertaken gratuitously is immaterial, except as evidence of the extent of care undertaken. The compensation received is only one of a number of facts bearing on the question, What was the duty undertaken? The rule that a gratuitous undertaker is liable only for gross negligence is merely nominal. The practical result of the decisions is, that an undertaker, whether gratuitous or not, is held to such a degree of care and exertion in the business as in fact he undertook to bestow. — ED.

DR. WHARTON'S VIEW, AS CONDENSED IN 1 SHEARMAN AND REDFIELD
ON NEGLIGENCE, 4TH ED., SECTION 41.

Dr. Wharton insists that only two degrees of care or negligence should be recognized in our law, as only two were acknowledged by the Roman jurists. These are (1) the care to be required by one who is not, and does not profess to be, a good man of business or an expert in the affairs under consideration, and (2) the care to be required of one who is, or professes to be, such an expert. The care required from the first class might be called slight, and the care required from the second class might be called ordinary. Great care, he holds, should not be demanded in any case, if it is to be understood as implying anything more than what is here called ordinary care, the care of an expert, measured by what is usual among good men of business in the same line.

POLLOCK ON TORTS, 2D ED., 380, 24-26. [CONDENSED.]

The general duty of diligence includes the particular duty of competence in cases where the matter taken in hand is of a sort requiring more than the knowledge or ability which any prudent man may be expected to have. If a man will handle a ship, he is bound to have the ordinary competence of a seaman. This is not an exception or extension, but a necessary application of the general rule. For a reasonable man will know the bounds of his competence, and will not generally intermeddle where he is not competent. If, however, in emergency, and to avoid imminent risk, the conduct of something generally entrusted to skilled persons is taken by an unskilled person, no more is required of him than to make a prudent and reasonable use of such skill as he actually has.

Compare Clerk and Lindsell on Torts, 356.

BEVEN ON NEGLIGENCE, 30, 31. [CONDENSED.]

The division of negligence into the lack of such care as a good specialist would take in his business and the want of the ordinary care that is taken by persons not specialists, is not a division, properly speaking, of degrees of negligence, but rather into kinds. There is an impassable barrier forbidding a transfer from one of these classes to the other by the mere addition or subtraction of the quality of care. The *differentia* of the classes is possession of special knowledge or acquired skill. One may estop himself from denying the possession of the knowledge that his conduct represents him to possess; and then, though he has it not, he becomes bound as though he had.

1843. ROLFE, B., IN *WILSON v. BRETT*, 11 *Meeson and Welsby*, 115, 116.

I said I could see no difference between negligence and gross negligence; — that it was the same thing, with the addition of a vituperative epithet; . . .

1866. WILLES, J., IN *GRILL v. IRON SCREW COLLIER CO.*, *L. R.*
1 *Com. Pl.* 612.

Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. A person who under-

takes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. "Gross," therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use the expression "gross negligence," instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up.

MONTAGUE SMITH, J., IN SAME CASE, 614.

The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence.

CURTIS, J., IN STEAMBOAT NEW WORLD v. KING.

1853. 16 *Howard*, *474, *475.

The theory that there are three degrees of negligence described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In *Storer v. Gowen*, 18 Maine, 177, the Supreme Court of Maine say: "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define." Mr. Justice Story, *Bailments*, § 11, says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law." If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.

Recently, the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. *Wilson v. Brett*, 11 Meeson and Wels. 113; *Wyld v. Pickford*, 8 *ibid.* 443, 461, 462; *Hinton v. Dibbin*, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as *Tracy et al. v. Wood*, 3 Mason, 132, and *Foster v. The Essex Bank*, 17 Mass. 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the civil code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See *Toullier's Droit Civil*, 6th vol. p. 239, &c.; 11th vol. p. 203, &c.; *Makeldey, Man. Du Droit Romain*, 191, &c.

BRADLEY, J., IN *NEW YORK CENTRAL RAILROAD v. LOCKWOOD*.1873. 17 *Wallace*, 382-384.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities.¹ If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed.

NEGLIGENCE.

16 *American and English Encyclopædia of Law*, 398-403.

There is no fixed standard by which care may be measured and then designated as "great," "ordinary," or "slight." In some relations, a slight want of care is a want of ordinary care because of the high duty that is owing. In other relations, only a great failure of care is a want of ordinary care, because there is only a duty of imperfect obligation owing. While in still other relations, although the duty due is positive, it yet does not involve the idea of great care in its observance, and therefore the failure to exercise care must be something more than a slight failure to exercise care, although it may not involve the idea of a failure to use the highest care possible.

This must not be confused with the idea that there are degrees of negligence. For the reason stated above and amply shown elsewhere, there can be no degrees of negligence, but the standard of care required should and does vary with the different relationships in which parties stand to each other, and the different duties that are created or implied by law as existing between them under different circumstances. It follows that when the circumstances require great care it is but ordinary care under the circumstances; when they require but slight care that also is ordinary care, and where they do not require the highest, and yet will not admit the lowest kind of care, the care called for is, as in the other cases, ordinary care. Therefore ordinary care varies with the facts of each particular case, and the same act or omission may be negligent as to one person, not negligent as to another, and negligence for which a third can-

¹ 1 *Smith's Leading Cases*, 453, 7th American edition; *Story on Bailments*, § 571; *Wyld v. Pickford*, 8 *Meeson & Welsby*, 460; *Hinton v. Dibbin*, 2 *Queen's Bench*, 661; *Wilson v. Brett*, 11 *Meeson & Welsby*, 115; *Beal v. South Devon Railway Co.*, 3 *Hurlstone & Coltman*, 337; *Grill v. Iron Screw Collier Co.*, *Law Reports*, 1 *Common Pleas*, 600; *Philadelphia & Reading Railroad Co. v. Derby*, 14 *Howard*, 486; *Steamboat New World et al. v. King*, 16 *Id.* 474.

not recover because his contributory negligence bars his action ; while as to the first person there would have been no contributory negligence although all did the same act. Necessarily this makes the question of ordinary care usually a question of fact in each particular case, to be determined by the jury from the evidence. But in determining whether there has been a want of ordinary care the jury should be guided by some rule of law laid down by the judge as a test of its existence, and this brings us to a consideration of the

Test of Ordinary Care. — When a person in the observance or performance of a duty due to another has neither done nor omitted to do anything which an ordinarily careful and prudent person in the same relation and under the same conditions and circumstances would not have done or omitted to do, he has not failed to use ordinary care, and is therefore not guilty of negligence even though damage may have resulted from his action or want of action.

No. 6, Albany Law Journal, 314.

The rule, that due diligence is such attention and effort applied to a given case as the ordinary prudent man would put forth under the same circumstances, seems to meet the demands of every conceivable case. . . . The ratio of diligence to circumstances being thus fixed, the two extremes may change to an infinite extent without destroying the ratio, and without giving rise to what we term negligence. The bailee who undertakes the carriage of stone for the paving of a street is held to the rule that he must use such attention and effort as the ordinary prudent man would use under like circumstances.

The bailee, who undertakes to repair a delicate watch, is held to the rule that he must use such attention and effort as the ordinary prudent man would use under the same circumstances. The contract of the watchmaker is the same, relatively, as that of the hod-carrier. Each contracts to provide the reasonable ordinary skill and attention which a man in his position would exercise under like circumstances. The ratio, proportion, or correspondence of diligence to circumstances, of care to surroundings, is fixed and identical. And, in determining a question of diligence or negligence in either case, it would be only necessary to apply the same rule to varying circumstances and persons, to demand the same ratio between varying extremes. And it is not too much to assert that all the perplexity and misunderstanding on the subject of diligence and negligence are due to the habit of confounding the specific acts and circumstances, which must always vary, with the ratio or relation between them, which remains always the same. It is true that there *may* be different ratios of effort and attention to the circumstances and to the results desired. A man may contract to furnish the highest skill, the most perfect means and appliances, the most assiduous attention in the accomplishment of a specific end. But, when an individual so contracts, there is the element of *special* or *positive* intention introduced, which takes the case out of the category of diligence, and renders such a contract a special and extraordinary one. The law never requires such a special, positive intention. . . .

CHAPTER IV.

CONTRIBUTORY NEGLIGENCE.

BUTTERFIELD v. FORRESTER.

1809. 11 *East*, 60.

THIS was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before Bayley, J., at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the roadside at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at one hundred yards distance; and the witness who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it; the plaintiff, however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence Bayley, J., directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant, which they accordingly did.

Vaughan, Serjt., now objected to this direction, on moving for a new trial; and referred to Buller's *Ni. Pri.* 26,¹ where the rule is laid down, that "if a man lay logs of wood across a highway, though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action."

BAYLEY, J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

¹ The book cites *Carth.* 194, and 451, in the margin, which references do not bear on the point here in question.

LORD ELLENBOROUGH, C. J. A party is not to cast himself upon an obstruction which had been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Rule refused.

DAVIES v. MANN.

1842. 10 *Meeson & Welsby*, 546.

CASE for negligence. The declaration stated, that the plaintiff theretofore, and at the time of the committing of the grievance therein-after mentioned, to wit, on, &c., was lawfully possessed of a certain donkey, which said donkey of the plaintiff was then lawfully in a certain highway, and the defendant was then possessed of a certain wagon and certain horses drawing the same, which said wagon and horses of the defendant were then under the care, government, and direction of a certain then servant of the defendant, in and along the said highway; nevertheless the defendant, by his said servant, so carelessly, negligently, unskilfully, and improperly governed and directed his said wagon and horses, that by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendant, by his said servant, the said wagon and horses of the defendant then ran and struck with great violence against the said donkey of the plaintiff, and thereby then wounded, crushed, and killed the same, &c.

The defendant pleaded not guilty.

At the trial, before Erskine, J., at the last Summer Assizes for the county of Worcester, it appeared that the plaintiff, having fettered the fore-feet of an ass belonging to him, turned it into a public highway, and at the time in question the ass was grazing on the off side of a road about eight yards wide, when the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses. The learned judge told the jury, that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages travelling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part

of the driver of the wagon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury found their verdict for the plaintiff, damages 40s.

Godson now moved for a new trial, on the ground of misdirection. The act of the plaintiff in turning the donkey into the public highway was an illegal one, and, as the injury arose principally from that act, the plaintiff was not entitled to compensation for that injury which, but for his own unlawful act, would never have occurred. [PARKE, B. The declaration states that the ass was lawfully on the highway, and the defendant has not traversed that allegation; therefore it must be taken to be admitted.] The principle of law, as deducible from the cases is, that where an accident is the result of faults on both sides, neither party can maintain an action. Thus, in *Butterfield v. Forrester*, 11 East, 60, it was held that one who is injured by an obstruction on a highway, against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. So, in *Vennall v. Garner*, 1 C. & M. 21, in case for running down a ship, it was held, that neither party can recover when both are in the wrong; and Bayley, B., there says, "I quite agree that if the mischief be the result of the combined negligence of the two, they must both remain in *statu quo*, and neither party can recover against the other." Here the plaintiff, by fettering the donkey, had prevented him from removing himself out of the way of accident; had his forefeet been free no accident would probably have happened. *Pluckwell v. Wilson*, 5 Car. & P. 375; *Luxford v. Large*, Ibid. 421, and *Lynch v. Nurdin*, 1 Ad. & E. (N. S.) 29; 4 P. & D. 672, are to the same effect.

LORD ABINGER, C. B. I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B. This subject was fully considered by this Court in the case of *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 246, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*, that, although there may have been negligence on the part of the plaintiff, yet unless he

might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." In that case of *Bridge v. Grand Junction Railway Company*, there was a plea imputing negligence on both sides; here it is otherwise; and the judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

STILES v. GEESEY.

1872. 71 *Pennsylvania State*, 439.¹

BEFORE THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of York County.

Action on the case by Jacob B. Geesey against Thomas Stiles, for alleged injury by the negligence of William Stiles, son of defendant, by which plaintiff's horse and carriage were damaged.

Plaintiff's wife, driving in a light carriage of plaintiff's, hitched her horse to a tree on the road, and went into a friend's house. The carriage projected into the travelled part of the road. Whilst the carriage was so left, the defendant's son, William Stiles, was driving his father's team with a loaded wagon along the road. He got off to do something to his wagon; and seeing an acquaintance in a neighboring barn, stopped a moment to exchange a few words with him, the team moving on slowly at the time with the load up the hill, keeping the travelled track of the road till the front horse was just behind plaintiff's carriage standing unattended where it was left. At this point of time William Stiles was behind his own wagon, at some distance from it; and did not see the obstruction in the road in time to

¹ The statement of facts is abridged from the statement in the opinion and from the statement made by the reporter. The citations of counsel are omitted. — ED.

avoid a collision. The wagon collided with the carriage. Stiles halloed "Whoa," and his horses stopped. In the collision, the plaintiff's horse was fatally injured.

The third point of the plaintiff, which was affirmed in the charge to the jury by Fisher, P. J., is as follows:—

"That Thomas Stiles cannot excuse the negligence of William Stiles by showing that the plaintiff's property was placed where it received the injury by want of ordinary care by Mrs. Geesey, if, in the opinion of the jury such want is imputable to her, should the jury believe that William Stiles was chargeable with negligence in leaving his team and permitting it to go along the highway unattended."

Verdict for plaintiff.

W. C. Chapman and I. L. Mayer, for plaintiff in error.

Cochran & Hay, for defendant in error.

READ, J. [After stating the facts.] We have taken in brief, the defendant's statement of his defence, which fairly raises the question of contributory negligence. "It is an incontestable principle that where the injury complained of is the product of mutual or concurring negligence, no action for damages will lie. The parties being mutually in fault there can be no apportionment of the damages. The law has no scales to determine in such cases whose wrong-doing weighed most in the compound that occasioned the mischief:" per Woodward, J., 12 Harris, 469.

"The question presented to the Court or the jury is never one of comparative negligence, as between the parties; nor does very great negligence on the part of a defendant so operate to strike a balance of negligence as to give a judgment to a plaintiff whose own negligence contributes in any degree to the injury." *Wilds v. Hudson River Railroad Co.*, 24 N. Y. 432.

The third error assigned is that the Court erred in their charge to the jury on the plaintiff's third point, which was as follows: "That Thomas Stiles cannot excuse the negligence of William Stiles by showing that the plaintiff's property was placed where it received the injury, by want of ordinary care by Mrs. Geesey, if in the opinion of the jury such want is imputable to her, should the jury believe William Stiles was chargeable with negligence, in leaving his team and permitting it to go along the highway unattended," which point the Court affirmed, holding that although there was contributory negligence on the part of the plaintiff, he was entitled to recover from the defendant on account of his negligence. This was a binding instruction upon the jury, leaving nothing for them to inquire into practically, except the negligence of the defendant. In this the Court committed a clear error, and the judgment must be reversed, and *venire de novo* awarded.

TUFF v. WARMAN.

1857. *In Common Pleas* : 2 *Common Bench*, N. S. 740.1858. *In Exchequer Chamber* : 5 *Common Bench*, N. S. 573.¹

THIS was an action in which the defendant was charged with having so negligently navigated a steam-vessel in the river Thames as to run against and damage the barge of the plaintiff.

The defendant pleaded, first, not guilty ; secondly, that he had not the control or management of the steamer.

The cause was tried before Willes, J., at the sittings in London after last Hilary Term. The facts were as follows : The defendant was in charge of a steam-vessel called the "Celt" as pilot, coming up the river, some miles below Gravesend. The plaintiff's sailing-barge was proceeding with a fair wind down the river, having two men on board, one of whom was at the helm. It did not appear where the other was ; but it was clear that they kept no look-out, for the man at the helm stated that, the sail being in his way, he could not see forward without stooping, and he admitted that, although he saw the steamer coming when a considerable distance off, he did not look out again until she was within two or three yards of him, and when it was too late to avoid the collision. The steamer, it appeared, was on her right side according to the Admiralty regulations. The defendant stated that he was standing on the poop of the steamer, and saw the barge when about 300 yards distant, and immediately ported his helm ; that, if the barge had done the same, the collision would have been avoided ; that he thought the barge put her helm a-starboard ; and that, finding a collision inevitable, he put his helm hard a-port, and backed his engines, but too late. The defendant's evidence was corroborated by that of the captain and the mate of the steamer. On the other hand, two seamen, who were on board a yawl, and who saw the whole transaction, distinctly swore that the steamer's helm was not ported.

On the part of the defendant, it was insisted that the plaintiff was not entitled to recover, inasmuch as he had failed to comply with the sailing regulations enforced by the statute 17 & 18 Vict. c. 104, §§ 296, 297, 298 ;² and that, assuming that the defendant had been guilty of negligence, still, if there was any negligence on the part of the plaintiff, he could not maintain the action.

In leaving the case to the jury, the learned judge told them that, if both parties were equally to blame, and the accident the result of their

¹ The greater part of the argument is omitted. — ED.

² This point was overruled by the Court ; and the report as to it is here omitted. The statute provides *inter alia*, that when two vessels proceeding in opposite directions would, if they continued their respective courses, be in danger of colliding, the helms of both vessels shall be put to port. — ED.

joint negligence, the plaintiff could not be entitled to recover; that if the negligence or default of the plaintiff was in any degree the proximate/ of the damage, he could not recover, however great may have been the negligence of the defendant; but that if the negligence of the plaintiff was only remotely connected with the accident, then the question was, whether the defendant might not by the exercise of ordinary care have avoided it; that, as the people on board the plaintiff's barge were keeping no look-out, the defendant should have gone to starboard, or reversed his engines, and so avoided the collision, — and he referred for an illustration to the case of *Davies v. Mann*, 10 M. & W. 546; and he concluded thus: “Do you consider that the absence of a look-out was negligence on the part of the plaintiff? If so, you will consider whether it directly contributed to the accident. If you think that the plaintiff directly contributed to the accident, you will find for the defendant; but if you think that the defendant by his negligence directly caused the injury, you must find for the plaintiff.”¹

Verdict for plaintiff.

In the following Easter Term a rule was obtained on the part of the defendant calling upon the plaintiff to show cause why there should not be a new trial, on the ground that the learned judge had misdirected the jury, in this, that he ought to have told them that, if the plaintiff by his negligence contributed to the occasioning of the accident, he could not recover, whether he contributed directly or indirectly; and that, even assuming negligence on the defendant's part, the plaintiff could not recover if he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence; and that he should further have told the jury that if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover.

¹ In 5 Common Bench, n. s. 575, the summing-up is stated in the following language:—

“In his summing-up the learned judge told the jury that the plaintiff was not entitled to recover if it was an accident, or if the plaintiff by his negligence had directly contributed to the accident; and that, if the injury was occasioned by the negligence of both parties, the plaintiff had no remedy; and he asked the jury whether they thought the absence of look-out was an act of negligence on the part of the plaintiff; and if so, they would have to take it into consideration in deciding whether, notwithstanding that, the defendant was liable; and he further told them, that if the parties on one vessel had a look-out, and still persisted in a course which would inflict an injury, then they were liable, though there was no look-out on the other vessel, for that would not be the direct cause of the injury; and he referred to the case of *Davies v. Mann*, 10 M. & W. 546, by way of illustration. The learned judge further told the jury, that if they thought the accident had been partly caused by the plaintiff's own negligence, they should find for the defendant; but that if they thought the barge was injured by the negligence of the defendant, and that the negligence of the plaintiff did not directly contribute thereto, the plaintiff was entitled to recover.”—*Ed.*

Honyman showed cause; and cited *Dowell v. The General Steam Navigation Company*, 5 Ell. & Bl. 195.

[CRESSWELL, J. Suppose the plaintiff had seen the steamer coming, and had notwithstanding persisted in steering in the same direction, would he have been guilty of negligence?] No doubt he would. [CRESSWELL, J. Suppose he was guilty of another default, that of omitting to keep a proper look-out, would the plaintiff have directly contributed to the accident?] The question at present is, not whether the verdict was warranted by the evidence, but whether the direction was right.

Collier and Digby Seymour, in support of the rule.

. . . Is a man to be in a better position because he is so reckless as to keep no look-out than he would have been in if he had complied with the regulations and been guilty of a mere error in judgment? That would be holding out a premium for negligence. [Counsel referred to *Butterfield v. Forrester*, 11 East, 60. CRESSWELL, J. Have you found the doctrine of *Butterfield v. Forrester* — which was the case of a nuisance or obstruction on a highway — applied to a case of active negligence on the part of the plaintiff?] . . . The proper way of leaving the question to the jury here would have been, whether the defendant could by the exercise of ordinary care have avoided the accident, — whether the plaintiff's negligence in any degree contributed to the injury; not whether it directly or indirectly caused or contributed to it. [COCKBURN, C. J. Suppose the defendant saw the bargeman asleep at his helm, would he have been, independently of the statute, justified in keeping on his course and running into him? How does that case differ from that of a man falling asleep when driving, or of a drunken man lying on a highway?] He had no right to speculate on the bargeman's doing wrong. In the case of *The Mangerton*, 2 Jurist, N. S. 620, a sailing vessel not having ported her helm in sufficient time, and not having a light in accordance with the Admiralty regulations, was run into by a steamer; and it was held that the steamer was not to blame. Dr. Lushington there says, "Both parties are bound to act on the presumption that the statute must and will be obeyed. The vessel approaching is justified in supposing that the other will obey the statute."

The jury should have been directed as in *Smith v. Voss*, 1 Hurlst. & N. 97, and should have been asked to say whether the collision was in any degree caused by the negligence or breach of duty of the plaintiff. [COCKBURN, C. J. Is not that involved in the question which was left to them., viz., whether the plaintiff by his negligence directly contributed to the accident?] The introduction of that word "directly" was calculated to embarrass and mislead the jury, and to withdraw their minds from the real question in issue. [COCKBURN, C. J. Does not a man directly contribute to an accident by putting himself by

his own negligence in a position in which but for such negligence the accident would not have happened?'] In some sense, no doubt, he does.

The Court (COCKBURN, C. J., CRESSWELL, J., WILLIAMS, J., and WILLES, J.,) discharged the rule. All the judges, except WILLES, J., delivered opinions. The opinion of WILLIAMS, J., was as follows:—

WILLIAMS, J. I have arrived at the same conclusion, though not without considerable difficulty. With regard to the alleged misdirection, I must confess, after well considering the case of *Dowell v. The General Steam Navigation Company*, 5 Ellis & B. 195 (E. C. L. R. vol. 85), I am unable to distinguish the mode of directing the jury here from that which the Court of Queen's Bench sustained there. The law was there laid down, in conformity with several previous decisions, that if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he cannot recover, however great may have been the negligence of the defendant; but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question is whether the defendant might not by the exercise of ordinary care have avoided it. So far the doctrine of the cases is perfectly plain. But then comes the question, what is meant by the negligence of the plaintiff being proximately or directly contributory, or only remotely connected with the accident? And that is a question which must somehow or other be disposed of at the trial. I dissent entirely from the proposition urged by Mr. Collier, that the plaintiff is disentitled to recover if his negligence is either proximately or remotely connected with the accident. But I feel great difficulty in dealing with the question whether the negligence was proximate or remote; and I certainly feel great difficulty in getting rid of that question of law by leaving it to the jury. That, however, was the course adopted in the case of *Dowell v. The General Steam Navigation Company*, and followed by my Brother Willes upon this occasion. I will not attempt to controvert or dispute the propriety of that now, however much I may lament that the law is not on a more intelligible and satisfactory footing in this respect. It was further objected that, when the matter came to be left to the jury, it should have been left to them to say whether they thought the defendant might, by exercising ordinary care and diligence, have avoided the accident. It seems to me that that was in effect left to them. As to the other ground of the rule, viz. that the verdict was against evidence, I place great reliance on my Brother Willes's opinion. He expresses himself satisfied with the conclusion the jury came to; and I cannot say that I am dissatisfied.

Rule discharged. Leave to appeal granted.

The case was argued in the Exchequer Chamber before WIGHTMAN, J., ERLE, J., CROMPTON, J., WATSON, B., BRAMWELL, B., and CHANNELL, B.

Collier, Q. C. for defendant. . . .

Davies v. Mann is supportable on this ground that, although the plaintiff was guilty of negligence in tethering the donkey and leaving it on the highway, he had no control over it at the time, so as to be able, by the exercise of ordinary care, to avoid the injury. This is not the case of a barge moored in the river, but of a vessel navigated by persons who may be presumed to know the statutory regulations, and of whom it may fairly be assumed that they will obey them.

This is not a case of antecedent negligence on one side or the other but of concurrent negligence on the part of both. The plaintiff was not entitled to recover if he might, by the exercise of ordinary care, have avoided the collision.

[WIGHTMAN, J. The main objection here seems to be to the use of the word "directly." If by the exercise of ordinary care the plaintiff might have prevented the injury, he contributes to it, and therefore cannot recover. CROMPTON, J. The plaintiff cannot by his negligence cast upon the defendant the duty of using extraordinary care. It is not enough to say that the defendant has been negligent; but it is no answer to say that the plaintiff has been negligent also, unless you go on to show that, but for the plaintiff's negligence, the accident would not have happened, or might have been avoided.]

J. Wilde, Q. C., contra. . . .

If there has been an antecedent act of negligence in the one party, the question arises whether the other might not, by the exercise of ordinary care and skill, have avoided the consequences. For instance, a man lies down to sleep on a highway; that is an antecedent act of negligence on his part; but it will not justify another in negligently driving over him.

The jury were told [in substance] that they must find for the defendant if they thought the accident was partly caused by the plaintiff's own negligence. The word "directly" was not used as contradistinguished from "indirectly." The jury had already been instructed as to the sense in which that expression was to be understood. [CROMPTON, J. The word "contribute" is a very unsafe word to use; it is much too loose.]

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the Court:—

It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened.

In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.

This appears to be the result deducible from the opinion of the judges in *Butterfield v. Forrester*, 11 East, 60; *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 246; *Davies v. Mann*, 10 M. & W. 548; and *Dowell v. The General Steam Navigation Company*, 5 E. & B. 206 (E. C. L. R. vol. 85).

In the present case, the main objection taken to the summing-up was, that the judge left to the jury whether the plaintiff by his negligence "directly" contributed to the misfortune; and it was contended for the defendant that, whether he directly or indirectly contributed, was immaterial if he contributed to it by his negligence at all. But the direction to the jury must have reference to the evidence in the case; and taking the whole summing-up together in connection with the evidence, we do not think that the jury could have been misled by the use of the word "directly." The learned judge told the jury that, if the absence of a look-out was negligence on the part of the plaintiff, still, if the defendant also had a look-out, and nevertheless persisted in a course that would inflict an injury, he would be liable, though the plaintiff had no look-out; for that neglect of the plaintiff would not be the direct cause of the injury, that is to say, would not be a cause without which the injury would not have happened.

In this, which seems to be the obvious sense in which the word "direct" was used, we do not think there was any misdirection; and in other respects the summing-up does not appear to be objectionable, according to the rules to be adduced from the authorities referred to.

Upon the whole, then, we are of opinion that the judgment should be affirmed.

Judgment affirmed.

WELLS, J., IN MURPHY v. DEANE.

1869. 101 *Massachusetts*, 463-466.

[As to the rules laid down by WIGHTMAN, J., in *Tuff v. Warman*.]

The verdict in that case was for the plaintiff. The judge at *nisi prius* had instructed the jury that negligence of the plaintiff contributing directly to the injury, would defeat his recovery. The only question was whether the use of the term "directly" was not too

restrictive, and likely to mislead the jury; and the verdict was sustained on the ground that other portions of the charge made it clear that the jury must have understood the term as distinguishing between proximate and remote causes. The real question in the case was, not so much the effect of contributory negligence, as whether the alleged negligence of the plaintiff was so remote as not to bear the character of contributory negligence. Throughout the discussion the general doctrine is recognized that negligence of the plaintiff, co-operating to produce the result, will defeat the action; that the negligence of the defendant must be the sole cause of the injury. It is so explained by Mr. Justice Willes in the case of *London, Brighton & South Coast Railway Co. v. Walton*, 14 Law Times (N. S.) 253; s. c. Harr. & Ruth. 424; and so understood in *Scott v. Dublin & Wicklow Railway Co.*, 11 Irish C. L. 377.

It is apparent that the statement taken from *Tuff v. Warman* entirely overlooks the practical application of the rule as a guide in the trial of a cause. It was probably made without reference to the burden of proof. It not only fails to take into account the well-settled principle that the burden is upon the plaintiff to show due care on his own part, but, by its form, implies the contrary. We think, however, that the statement will be found to be faulty in substance, as well as in form. One of the propositions in this statement is, that "mere negligence, or want of ordinary care or caution, will not disentitle the plaintiff to recover, unless it be such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened." There is certainly nothing indicated in this proposition for the plaintiff to establish affirmatively. More than this; if it should appear that the negligence of the defendant was an adequate cause to produce the result, the plaintiff must recover, even though he was himself equally, or even to a greater degree than the defendant, in fault. If the case can be supposed in which both parties were equally in fault, the fault of each being equally proximate, direct, and adequate to produce the result, so that it might have occurred from the conduct of either without the fault of the other, there would then be a case of contributory negligence, for the consequences of which neither could recover from the other. But upon the statement quoted from *Tuff v. Warman*, neither would be "disentitled," and therefore both could recover if both suffered injury, each from the other. Every case in which the proof fails to show, or leaves it in doubt, which of two sufficient causes was the actual proximate cause of the injury, is practically such a case. It is manifest from this illustration, that, as a definition of the limits of the right to recover in such cases, the proposition referred to must be logically incorrect. Eliminating negatives from the first branch of the proposition, it is, that a plaintiff may recover in such cases, unless the misfortune could not have happened but for his own negligence. This, as we have seen, being stated affirmatively, is too broad, and not correct; although its supplement or negative counter-

part is correct, as far as it extends, to wit, that he cannot recover if the misfortune could not have happened but for his own negligence.

In *Greenland v. Chaplin*, 5 Exch. 248, Chief Baron Pollock states the rule "that, when the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action." Except that, in form of statement, it leaves out of view the consideration of the burden of proof, this seems to us to be accurate, and in accordance with the current of authorities. See *Dowell v. General Steam Navigation Co.*, 5 El. & Bl. 195; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *Johnson v. Hudson River Railroad Co.*, 20 N. Y. 65; *Trow v. Vermont Central Railroad Co.*, 24 Vt. 487; *Beers v. Housatonic Railroad Co.*, 19 Conn. 566. •

The statement in *Tuff v. Warman*, proceeds thus: "Nor if the defendants might, by the exercise of due care on their part, have avoided the consequences of the neglect or carelessness of the plaintiff." This, as already suggested, may be correct as applied to a case like *Tuff v. Warman*, where the negligence of the plaintiff was in a certain sense remote, preceding the negligent conduct of the defendant. But where the negligent conduct of the two parties is contemporaneous, and the fault of each relates directly and proximately to the occurrence from which the injury arises, the rule of law is rather that the plaintiff cannot recover if by due care on his part he might have avoided the consequences of the carelessness of the defendant. *Lucas v. New Bedford & Taunton Railroad Co.*, 6 Gray, 64; *Waite v. Northeastern Railway Co.*, 9 El. & Bl. 719; *Robinson v. Cone*, 22 Vt. 213. Suppose the case of a collision upon a public highway; both parties careless and equally in fault, but either, by the exercise of proper care on his part, might have avoided the consequences of the carelessness of the other. By the proposition last quoted from *Tuff v. Warman*, each would be liable to the other, and each would be entitled to recover from the other, for whatever injuries he might have thus received.

We think it is manifest that the rule thus laid down in *Tuff v. Warman* is not the correct rule of law which governs ordinary cases of injury by negligence; but whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part. *Trow v. Vermont Central Railroad Co.*, 24 Vt. 487; *Birge v. Gardiner*, 19 Conn. 507.¹

¹ As to the burden of proof there is a conflict of authority. See *Shearman & Redfield on Negligence*, 4th ed., ss. 106-108. — Ed.

RADLEY, ET AL. v. LONDON AND NORTH WESTERN
RAILWAY COMPANY.1876. *Law Reports*, 1 *Appeal Cases*, 754.¹

THIS was an appeal against a decision of the Court of Exchequer Chamber.

The appellants were the plaintiffs in an action brought in the Court of Exchequer, in which they claimed to recover damages for the destruction of a bridge occasioned, as they alleged, by the negligence of the defendants' servants. The plaintiffs were owners of the Sankey Brook Colliery, in the county of Lancaster, which was situated near a branch line of the defendants' railway. There was a siding belonging to the plaintiffs, which communicated with the railway, and the defendants' servants were in the habit of taking trucks loaded with coals from this siding, in order to run them on the railway to forward them to their destination, and also of bringing back empty trucks and running them from the railway on to the siding. On Saturday after working hours, when all the colliery men had gone away, the defendants' servants ran some of the plaintiffs' empty trucks from the railway upon the siding and there left them. In that position they remained. One of the watchmen employed by the plaintiffs knew that they were there, but nothing was done to remove them to a different place. In the first of these trucks, had been placed a truck which had broken down, and the height of the two trucks combined was nearly eleven feet. There was, in advance of the spot where the trucks had been left, a bridge placed over a part of the siding, the span of which bridge was about eight feet from the ground. On Sunday afternoon the defendants' servants brought a long line of empty trucks belonging to the plaintiffs, and ran them on the line of the siding, pushing on the first set of trucks in front. Some resistance was perceived, and the pushing force of the engine employed was increased, and the result was, as the two trucks at the head of the line could not pass under the bridge, they struck with great force against it and broke it down.² For the damage thereby occasioned this action was brought. The defence was contributory negligence; it being insisted that the plaintiffs ought to have moved the first set of trucks to a safe place, or at all events, not to have left the truck with the disabled truck in it so as to be likely to occasion mischief. At the trial before Mr. Justice Brett, at the Summer Assizes at Liverpool, in 1873, the

¹ Arguments omitted. — ED.

² " . . . The wagon so loaded coming to the bridge and being unable to pass underneath it, the train stopped, and those who had charge of it, without looking to ascertain the cause of the stoppage, gave momentum to the engine to such an extent that the wagon with its load knocked the bridge down." Statement of facts in opinion of Bramwell, B., L. R. 9 Exch. p. 72. Compare statement in L. R. 10 Exch. p. 102. — ED.

learned judge told the jury that "you must be satisfied that the plaintiffs' servants did not do anything which persons of ordinary care, under the circumstances, would not do, or that they omitted to do something which persons of ordinary care would do. . . . It is for you to say entirely as to both points; but the law is this, the plaintiffs must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own, in other words that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants."¹ The jurors having, on this direction, stated that they thought there was contributory negligence on the part of the plaintiffs, the learned judge directed that the verdict should be entered for the defendants, but reserved leave for the plaintiffs to move.

A rule having been obtained for a new trial, it was after argument before Barons Bramwell and Amphlett made absolute.² On appeal to the Exchequer Chamber the decision was, by Justices Blackburn, Mellor, Lush, Brett, and Archibald (*diss.* Justice Denman), reversed.³ This appeal was then brought.

Mr. Herschell, Q. C., and *Mr. Baylis*, Q. C., for the appellants.

Mr. Aspinall, Q. C., and *Mr. McConnell*, for the respondents.

LORD PENZANCE. My Lords, the action out of which this appeal arises is an action charging the defendants with negligence (through their servants) in so managing the shunting of some empty coal-wagons as to knock down a bridge and some staging and some colliery head-gearing, which stood upon it, and belonged to the plaintiffs.

The first question on the appeal is, whether the Court of Exchequer Chamber was right in holding that there was any evidence, proper to be submitted to the jury, tending to the conclusion that the plaintiffs themselves had been guilty of some negligence in the matter, and that such negligence had contributed to produce the accident and injury of which they complained.

The general facts of the case, the particular facts which gave rise to the imputation of negligence, and the contention of both sides as to the fair result of these facts, are stated in the judgment of the Court of Exchequer delivered by Baron Bramwell. His Lordship here read the statement from Mr. Baron Bramwell's judgment.⁴

It may be admitted that this is a fair and full statement of the arguments and considerations on the one side, and on the other, upon which the question of the plaintiffs' negligence had to be decided. But it had to be decided by the jurors, and not by the Court, and I am unable to perceive any reason why the learned judge did wrong in submitting these arguments and considerations to their decision accordingly. The bare statement of them is enough to show that there

¹ Printed papers in the case.

³ Law Rep. 10 Ex. 700.

² Law Rep. 9 Ex. 71.

⁴ Law Rep. 9 Ex. at p. 72.

were in the case facts and circumstances sufficient at least to raise the question of negligence, whether they were a sufficient proof of negligence or not.

The decision, therefore, of the Exchequer Chamber upon this matter ought, I think, to be upheld.

The remaining question is whether the learned judge properly directed the jury in point of law. The law in these cases of negligence is, as was said in the Court of Exchequer Chamber, perfectly well settled and beyond dispute.

The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiffs' negligence will not excuse him.

This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies v. Mann*,¹ supported in that of *Tuff v. Warman*,² and other cases, and has been universally applied in cases of this character without question.

The only point for consideration, therefore, is whether the learned judge properly presented it to the mind of the jury.

It seems impossible to say that he did so. At the beginning of his summing-up he laid down the following as the propositions of law which governed the case: It is for the plaintiffs to satisfy you that this accident happened through the negligence of the defendants' servants, and as between them and the defendants, that it was solely through the negligence of the defendants' servants. They must satisfy you that it was solely by the negligence of the defendants' servants, or, in other words, that there was no negligence on the part of their servants contributing to the accident; so that, if you think that both sides were negligent, so as to contribute to the accident, then the plaintiffs cannot recover.

This language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the plaintiffs' servants, they could not, without disregarding the direction of the learned judge, have found in the plaintiffs' favor, however negligent the defendants had been, or however easily they might with ordinary care have avoided any accident at all.

The learned judge then went on to describe to the jury what it was that might properly be considered to constitute negligence, first in the conduct of the defendants, and then in the conduct of the plaintiffs;

¹ 10 M. & W. 546.

² 5 C. B. (N. S.) 573; 27 L. J. C. P. 322.

and having done this, he again reverted to the governing propositions of law, as follows: "There seem to be two views. It is for you to say entirely as to both points. But the law is this, the plaintiff must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants."

This, again, is entirely without qualification, and the undoubted meaning of it is, that if there was any contributory negligence on the part of the plaintiffs, they could in no case recover. Such a statement of the law is contrary to the doctrine established in the case of *Davies v. Mann*,¹ and the other cases above alluded to, and in no part of the summing-up is that doctrine anywhere to be found. The learned counsel were unable to point out any passage addressed to it.

It is true that in part of his summing-up the learned judge pointed attention to the conduct of the engine-driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine-driver might at this stage of the matter by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.

In point of fact the evidence was strong to show that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine-driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. This substantial defect of the learned judge's charge is that that question was never put to the jury.

On this point, therefore, I propose to move that your Lordships should reverse the decision of the Exchequer Chamber, and direct a new trial.

THE LORD CHANCELLOR (Lord Cairns). My Lords, I have had the advantage of considering the opinion which has just been expressed to your Lordships in this case by my noble and learned friend, and, concurring as I do with every word of it, I do not think it is necessary that I should do more than say that I hope your Lordships will agree to the motion which he has proposed.

LORD BLACKBURN. My Lords, I agree entirely with the noble Lord who has first spoken as to what were the proper questions for the jury in this case, and that they were not decided by the jury. I am inclined to think that the learned judge did in part of his summing-up sufficiently ask the proper questions, had they been answered, but unfortunately he failed to have an answer from the jury to those ques-

tions, it appearing by the case that the only finding was as to the plaintiffs' negligence.

I agree, therefore, in the result that there should be a new trial.

LORD GORDON. My Lords, I entirely concur in the motion which has been submitted to your Lordships by my noble and learned friend on the other side of the House. The question is one which has given rise to some difficulty in the courts of Scotland, but I think that it is very likely that the opinion which has been expressed in this case will be regarded as a very useful authority for guiding their decisions.

Judgment of the Court of Exchequer Chamber reversed.

Judgment of the Court of Exchequer restored, and a new trial ordered, with costs.

Lords' Journals, December 1, 1876.

LORD ESHER, M. R., IN THOMAS v. QUARTERMAINE.

1887. *Law Reports, 18 Queen's Bench Division, 688.*

"In an action for injuries arising from negligence, it always was a defence that the plaintiff had failed to show that, as between him and the defendant, the injury had happened solely by the defendant's negligence. If the plaintiff by some negligence on his part directly contributed to the injury, it was caused by the joint negligence of both, and no longer solely by the negligence of the defendant, and that formed a defence to the action."

BOWEN, L. J., IN SAME CASE, pp. 694, 697.

The plaintiff in an action for negligence would have "to prove two things in order to succeed: The first, that the defendant had been guilty of some negligence, that is to say, of some breach of duty towards the plaintiff himself. The second, that the defendant's negligence had been the proximate cause of such accident; that there had not merely been *incuria*, but *incuria dans locum injuriæ*. Whether there has or has not been contributory negligence is, to speak precisely, only a branch of this second inquiry. Contributory negligence in a plaintiff only means that he himself has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause." p. 694.

Contributory negligence "rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury. It is for this reason that, under the old form of pleading, the defence of contributory negligence was raised, in actions based on negligence, under the plea of 'not guilty.'" p. 697.

NASHUA IRON AND STEEL CO. v. WORCESTER & NASHUA RAILROAD CO.

1882. 62 *New Hampshire*, 159.

CASE. Demurrer to the declaration.

C. H. Burns and *C. W. Hoitt*, for plaintiffs.*A. F. Stevens*, for defendants.

CARPENTER, J. The declaration alleges that by the defendants' careless management of their engine and cars, the plaintiffs' horse was frightened, and caused to run upon and injure Ursula Clapp, who was without fault; that Clapp brought her action therefor against the plaintiffs, and recovered judgment for damages, which they paid; that the defendants had notice of, and were requested to defend, the suit. The defendants demur. Inasmuch as Clapp could not have recovered against the plaintiffs unless they were in fault (*Brown v. Collins*, 53 N. H. 442; *Lyons v. Child*, 61 N. H. 72), it must be taken that their negligence co-operated with that of the defendants to produce the injury. If the plaintiffs were not liable in that action because their negligence was not, and the defendants' negligence was, the cause of the accident, the objection is not now open to the defendants. *Littleton v. Richardson*, 34 N. H. 179. In relation to Clapp, both parties were wrong-doers. She could pursue her remedy against either or both of them at her election. *Burrows v. March Gas Co.*, L. R. 5 Ex. 67, 71.

One of several wrong-doers, who has been compelled to pay the damages caused by the wrong, has in general no remedy against the others. He cannot make his own misconduct the ground of an action in his favor. To this proposition there are, it has been said, so many exceptions, that it can hardly, with propriety, be called a general rule. *Bailey v. Bussing*, 28 Conn. 455. Its application is restricted to cases where the person seeking redress knew, or is presumed to have known, that the act for which he has been mulcted in damages was unlawful. *Jacobs v. Pollard*, 10 Cush. 287, 289; *Coventry v. Barton*, 17 Johns. 142. In many instances several parties may be liable in law to the person injured, while as between themselves some of them are not wrong-doers at all; and the equity of the guiltless to require the actual wrong-doer to respond for all the damages, and the equally innocent to contribute his proportion, is complete. *Wooley v. Batte*, 2 C. & P. 417; *Pearson v. Skelton*, 1 M. & W. 504; *Betts v. Gibbins*, 2 A. & E. 57; *Adamson v. Jarvis*, 4 Bing. 66; *Avery v. Halsey*, 14 Pick. 174; *Gray v. Boston Gas Light Co.*, 114 Mass. 149; *Churchill v. Holt*, 127 Mass. 165, and 131 Mass. 67; *Bailey v. Bussing*, *supra*; *Smith v. Foran*, 43 Conn. 244. These cases, instead of being exceptions to the rule, seem rather not to fall within it. The right of recovery rests in the one case upon the principle that he who without fault on his part is

injured by another's wrongful act is entitled to indemnity, and in the other upon the doctrine of contribution. One of two masters, who is compelled to pay damages by reason of his servant's negligence, may have contribution from the other because he has removed a burden common to both. They may recover indemnity of the servant, because as against him they are without fault, and are directly injured by his misconduct. One who is so far innocent that he can recover for an injury to his person or property, may also recover whatever sum he, by reason of his relation to the wrong, has been compelled to pay to a third person. If the plaintiffs could recover for an injury to their horse, caused by the accident, they may recover the sum which they paid to Clapp.

The declaration is general. It does not disclose the particulars of the plaintiffs' negligence, by reason of which Clapp recovered against them. Under it, cases differing widely in their facts and legal aspects may be proved. Among others possible, it may be shown that the horse was in the charge of the plaintiffs' servants, who might have prevented its fright or its running after the fright, or if they could do neither, that they might nevertheless have avoided the injury to Clapp; or it may appear that the plaintiffs' negligence consisted solely in permitting the horse, whether attended or unattended by their servants, to be at the place where it was at the time of the fright. The generality of the declaration does not render it bad in law. *Corey v. Bath*, 35 N. H. 531. If the plaintiffs are entitled to judgment upon any state of facts provable under it, the demurrer must be overruled. Whether the plaintiffs can recover in any case, and if so, in what cases, possible to be proved under the declaration, are speculative or hypothetical questions, of which none may, and all cannot, arise. They involve substantially the whole subject of the law relating to mutual negligence. The case might properly be discharged without considering them (*Smith v. Cudworth*, 24 Pick. 196), and the parties required to present by the pleadings, or by a verdict, the facts upon which their rights depend. A brief consideration, however, of the general questions involved, may, it is thought, facilitate a trial, and save expense to the parties.

Ordinary care is such care as persons of average prudence exercise under like circumstances. *Tucker v. Henniker*, 41 N. H. 317; *Sleeper v. Sandown*, 52 N. H. 244; *Aldrich v. Monroe*, 60 N. H. 118. Every one in the conduct of his lawful business is bound to act with this degree of care, and if he fails to do so is responsible for the consequences. It follows that a person injured by reason of his want of ordinary care, or (since the law makes no apportionment between actual wrong-doers) by the joint operation of his own and another's negligence, is remediless. This general rule of law justly applied to the facts determines, it is believed, the rights of the parties in all actions for negligence. In its application, the law, as in various other cases, deals with the immediate cause, — the cause as distinguished from the occasion, — and

looks at the natural and reasonably to be expected effects. *Cowles v. Kidder*, 24 N. H. 383; *Hooksett v. Company*, 44 N. H. 108; *McIntire v. Plaisted*, 57 N. H. 608; *Solomon v. Chesley*, 59 N. H. 243; *China v. Southwick*, 12 Me. 238; *Lowery v. Western U. Tel. Co.*, 60 N. Y. 198; *Rigby v. Hewitt*, 5 Exch. 243; *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781; *Bank of Ireland v. Evans's Charities*, 5 H. L. Ca. 389, 410, 411; *Ionides v. Marine Ins. Co.*, 14 C. B. N. s. 259; *Romney Marsh v. Trinity House*, L. R. 5 Ex. 204; *Holmes v. Mather*, L. R. 10 Ex. 268; *Sharp v. Powell*, L. R. 7 C. P. 253; *Pearson v. Cox*, 2 C. P. Div. 369; *Tutein v. Hurley*, 98 Mass. 211; Bro. Leg. Max. 215.

Actions for negligence may, for convenience of consideration, be separated into four classes, namely, — where, upon the occasion of the injury complained of (1) the plaintiff, (2) the defendant, or (3) neither party was present, and (4) where both parties were present. In all of them it may happen that both parties were more or less negligent. Actions upon the statute of highways are a common example of the first class. The negligence of the defendant, however great, does not relieve the plaintiff from the duty of exercising ordinary care. If, notwithstanding the defective condition of the highway, this degree of care on the part of the plaintiff would prevent the accident, his and not the defendant's negligence, though but for the latter it could not happen, is, in the eye of the law, its sole cause. *Farnum v. Concord*, 2 N. H. 394; *Butterfield v. Forrester*, 11 East, 60. In this class of cases, an injury which the plaintiff's negligence contributes to produce could not happen without it. The not uncommon statement that the plaintiff cannot recover if his negligence contributes in any degree to cause the injury, is strictly correct, although the word "contribute" may be, as Crompton, J., in *Tuff v. Warman*, 5 C. B. N. s. 584, says it is, "a very unsafe word to use," and "much too loose." The result is the same whether the plaintiff acts with full knowledge of the danger, or, by reason of a want of proper care, fails to discover it seasonably. If he is not bound to anticipate, and in advance provide for, another's negligence, he may not wilfully or negligently shut his eyes against its possibility. He is bound to be informed of everything which ordinary care would disclose to him. He can no more recover for an injury caused by driving into a dangerous pit, of which he is ignorant, but of which ordinary care would have informed him, than for one caused by carelessly driving into a known pit. *Norris v. Litchfield*, 35 N. H. 271; *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, 41 N. H. 317; *Winship v. Enfield*, 42 N. H. 213, 214; *Underhill v. Manchester*, 45 N. H. 220.

The defendant's negligence being found or conceded, the remaining question is, whether the plaintiff, by the exercise of ordinary care, could have escaped the injury. If he could not, he is free from fault, and is entitled to recover. If he could, he not only cannot recover for his own injury, but is himself liable to the other party, if the latter is injured; and the case becomes one of the second class, of which *Davies*

v. *Mann*, 10 M. & W. 546, is an instance. The defendant is liable here for the same reason ~~that, as~~ plaintiff, he could not recover,—that is to say, because ordinary care on his ~~part would have prevented the~~ injury. The fact that one has carelessly exposed his property in a dangerous situation does not absolve his neighbors from the obligation of conducting themselves in regard to it with ordinary care. An injury which that degree of care would prevent is caused by the want of it, and not by the owner's negligence in leaving his property in a perilous position. A surgeon, called to set a leg carelessly broken, cannot successfully urge, in answer to a suit for mal-practice, that the patient's negligence in breaking his leg caused the crooked or shortened limb. *Lannen v. Albany Gas-light Co.*, 44 N. Y. 459, 463; *Hibbard v. Thompson*, 109 Mass. 286, 289. So far as the question of civil liability is concerned, there is no distinction, except it may be in the measure of damages (*Fay v. Parker*, 53 N. H. 342, *Bixby v. Dunlap*, 56 N. H. 456), between wilful and negligent wrongs. One who, without reasonable necessity, kills his neighbor's ox, found trespassing in his field, is equally liable whether he does it purposely or carelessly. *Aldrich v. Wright*, 53 N. H. 398; *McIntire v. Plaisted*, 57 N. H. 606; *Cool*. Torts 688–694. Mann would be no more liable for wilfully shooting the fettered ass which Davies has carelessly left in the public highway, than he is for the running over it, which, by ordinary care, he could avoid. The owner's negligence, in permitting the ox to stray and in leaving the ass fettered in the street, although without it the injury would not happen, is no more the cause, in a legal sense, of the negligent than of the wilful wrong. In each case alike,—as in that of the broken leg,—it merely affords the wrong-doer an opportunity to do the mischief. *Bartlett v. Boston Gas-light Co.*, 117 Mass. 533; *Clayards v. Dethick*, 12 Q. B. 439, 445.

Knowledge, or its equivalent, culpable ignorance, and ignorance without fault of the situation, are circumstances by which, among others, the requisite measure of vigilance is determined. *Griffin v. Auburn*, 58 N. H. 121, 124; *Palmer v. Dearing*, 93 N. Y. 7; *Robinson v. Cone*, 22 Vt. 213. The question of contributory negligence is not involved. The wrong, if any, is the negligent injury of property carelessly exposed to danger. The only question is, whether the defendant could have prevented it by ordinary care. If he could not, he is without fault, and not liable. If he could, his negligence is, in law, the sole cause of the injury. *Davies v. Mann*, 10 M. & W. 546; *Radley v. London, &c. Railway*, 1 App. Ca. 754; *Mayor of Colchester v. Brooke*, 7 Q. B. 377; *Isbell v. N. Y. & N. H. Railroad*, 27 Conn. 393; *Trow v. Vt. Central Railroad*, 24 Vt. 487; *Harlan v. St. Louis, &c. Railroad*, 64 Mo. 480; *Kerwhacker v. Cleveland, &c. Railroad*, 3 Ohio St. 172.

The law is not affected by the presence or the absence of the parties, nor by the difficulty of applying it to complicated facts. To warrant a recovery where both parties are present at the time of the

injury, as well as in other cases, ability on the part of the defendant must concur with non-ability on the part of the plaintiff to prevent it by ordinary care. Their duty to exercise this degree of care is equal and reciprocal; neither is exonerated from his obligation by the present or previous misconduct of the other. The law no more holds one responsible for an unavoidable, or justifies an avoidable, injury to the person of one who carelessly exposes himself to danger, than to his property, similarly situated in his absence. He who cannot prevent an injury negligently inflicted upon his person or property by an intelligent agent, "present and acting at the time" (*State v. Railroad*, 52 N. H. 528, 557; *White v. Winnisimmet Co.*, 7 Cush. 155, 157; *Robinson v. Cone*, 22 Vt. 213), is legally without fault, and it is immaterial whether his inability results from his absence, previous negligence, or other cause. On the other hand, his neglect to prevent it, if he can, is the sole or co-operating cause of the injury. No one can justly complain of another's negligence, which, but for his own wrongful interposition, would be harmless. *Parker v. Adams*, 12 Met. 415.

Cases of this class assume a great variety of aspects. While all are governed by the fundamental principle, that he only who by ordinary care can and does not prevent an injury, is responsible in damages, it is impossible to formulate a rule in language universally applicable. A statement of the law correct in its application to one state of facts may be inaccurate when applied to another. Instructions to the jury proper and sufficient in a case of the first class, would be not only inappropriate but incorrect in one of the second class. The doctrine laid down in *Tuff v. Warman*, 5 C. B. N. S. 573, 585, however just and well suited to the evidence in that case, was held erroneous as applied to the facts in *Murphy v. Deane*, 101 Mass. 455, 464-466, and, as a general proposition, seems indefensible.

An accident may result from a hazardous situation caused by the previous negligence of one or both parties. If, at the time of the injury, the defendant is unable to remove the danger which his negligence has created, the case becomes, in substance, one of the first class; the plaintiff can recover or not, according as, by ordinary care, he can or cannot protect himself from the natural consequences of the situation. If the plaintiff, in like manner, is unable to obviate the danger which his prior negligence has produced, the case becomes, substantially, one of the second class; he can recover or not, according as the defendant, by the same degree of care, can or cannot avoid the natural consequences of such negligence. If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct. The latter is *incuria*, but not *incuria dans locum injuriæ*,—it is the cause of the danger; the former

is the cause of the injury. *Metropolitan Railway v. Jackson*, 3 App. Ca. 193, 198; *Dublin, &c. Railway v. Slattery*, 3 App. Ca. 1155, 1166; *Davey v. London, &c. Railway*, 12 Q. B. Div. 70, 76; *Churchill v. Rosebeck*, 15 Conn. 359, 363-365.

If a person, who by his carelessness is put in a position perilous to himself and to others, while in that position does all that a person of average prudence could, he is guilty of no wrong towards another who embraces the opportunity negligently to injure him, or who receives an injury which proper care on his part would prevent. It would doubtless be esteemed gross carelessness to navigate the Atlantic in a vessel without a rudder, but if the owner, while sailing his rudderless ship with ordinary care, is negligently run down by a steamer, the latter must pay the damages, and can recover none if it is injured. *Dowell v. Steam Navigation Co.*, 5 E. & B. 195; *Haley v. Earle*, 30 N. Y. 208; *Hoffman v. Union Ferry Co.*, 47 N. Y. 176. If the vessel, by reason of its lack of a rudder, runs upon and injures the steamer, both being in the exercise of ordinary care at the time, the former must pay the damages. He who by his negligence has produced a dangerous situation is responsible for an injury resulting from it to one who is without fault.

If, at the time of the injury, each of the parties, or, in the absence of antecedent negligence, if neither of them could prevent it by ordinary care, there can be no recovery. The comparatively rare cases of simultaneous negligence will ordinarily fall under one or the other of these heads. If the accident results from the combined effect of the negligence of both parties, that of neither alone being sufficient to produce it, proof by the plaintiff that due care on the part of the defendant would have prevented it will not entitle him to recover, because like care on his own part would have had the same effect. If the misconduct of each party is an adequate cause of the injury, so that it would have occurred by reason of either's negligence without the co-operating fault of the other, proof by the plaintiff that by due care he could not have prevented it will not entitle him to recover, because no more could the defendant have prevented it by like care. *Murphy v. Deane*, 101 Mass. 464, 465; *Churchill v. Holt*, 131 Mass. 67. In each case alike they are equally in fault. To warrant a recovery, the plaintiff must establish both propositions, namely, that by ordinary care he could not, and the defendant could, have prevented the injury. *State v. Railroad*, 52 N. H. 528; *Bridge v. Grand Junction Railway*, 3 M. & W. 244; *Dowell v. Steam Navigation Co.*, 5 E. & B. 195; *Tuff v. Warman*, 5 C. B. n. s. 573; *Davey v. London, &c. Railway*, 12 Q. B. Div. 70; *Munroe v. Leach*, 7 Met. 274; *Lucas v. New Bedford, &c. Railroad*, 6 Gray, 64; *Murphy v. Deane*, 101 Mass. 455; *Hall v. Ripley*, 119 Mass. 135; *Button v. Hudson, &c. Railroad*, 18 N. Y. 248; *Austin v. N. J. Steamboat Co.*, 43 N. Y. 75; *Barker v. Savage*, 45 N. Y. 194; *Cool. Torts*, 674, 675, and cases cited.

In the comparatively unfrequent cases of the third class, a negligent

plaintiff can seldom, if ever, recover. Where both parties are careless, they are usually, if not always, equally in fault; ordinary care on the part of either would prevent the injury. Not being present on the occasion of the accident, neither can, in general, guard against the consequences of the other's negligence. *Blyth v. Topham*, Cro. Jac. 158; *Sybray v. White*, 1 M. & W. 435; *Williams v. Groucott*, 4 B. & S. 149; *Lee v. Riley*, 18 C. B. n. s. 722; *Wilson v. Newberry*, L. R. 7 Q. B. 31; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Firth v. Bowling Iron Co.*, 3 C. P. Div. 254; *Crowhurst v. Amersham Burial Board*, 4 Ex. Div. 5; *Bush v. Brainard*, 1 Cow. 78; *Lyons v. Merrick*, 105 Mass. 71; *Page v. Olcott*, 13 N. H. 399.

If there are actions for negligence of such a character that the rights of the parties are not determinable by the application of these principles, the present case is not one of them. If, notwithstanding the defendants' negligence, the plaintiffs, by ordinary care, could have prevented the fright of the horse, or its running, after the fright, or, in the absence of ability to do either, if they could have avoided the running upon and injury to Clapp, their misconduct, and not that of the defendants, was the cause of the accident, and they cannot recover. On the other hand, if the plaintiffs' carelessness consisted solely in permitting the horse to be where it was at the time, and ordinary care by the defendants would have prevented its fright, or, if the plaintiffs, by proof of any state of facts competent to be shown under the declaration, can make it appear that at the time of the occurrence they could not, and the defendants could, by such care have prevented the accident, they are entitled to recover. *Demurrer overruled.*

NEAL v. GILLET.

1855. 23 Connecticut, 437.¹

ACTION to recover for personal injury alleged to have been incurred through the negligence of the defendants. Plaintiff claimed that the defendants were guilty of gross negligence, as the cause of the injury; and that, if the jury should so find, the plaintiff was entitled to recover, notwithstanding there had been on his part a want of mere ordinary care which might have essentially contributed to produce the injury complained of. The Court charged the jury in conformity to this claim of the plaintiff. Verdict for plaintiff. Motion for new trial.

R. D. Hubbard, in support of motion.

Hooker and Philleo, contra.

¹ Part of case omitted; also arguments.—Ed.

SANFORD, J. [Omitting opinion on another point.] The question, presented upon the second point, is, whether a plaintiff is entitled to recover for an injury, produced by the combined operation of his own want of "ordinary care," and the gross negligence of the defendant. The exact boundaries between the several degrees of care and their correlative degrees of carelessness, or negligence, are not always clearly defined or easily pointed out. We think, however, that by "ordinary care," is meant "that degree of care which may reasonably be expected from a person in the party's situation" (41 E. C. L. R., 425), that is, "reasonable care" (19 Conn. R., 572); and that "gross negligence" imports not a malicious intention or design to produce a particular injury, but a thoughtless disregard of consequences; the absence, rather than the actual exercise, of volition with reference to results.

What is the measure of "reasonable care" must of course depend upon the circumstances of the particular situation in which the party at the time is placed. But "reasonable care," every one, in the enjoyment of his rights, and the performance of his duties, is bound to exercise at all times and under all circumstances. When he has done that, he is answerable to no one for any consequences which ensue, for he has done all his duty; when he has done less than that, he is in fault, and if an injury ensue to another in consequence of such fault, he is responsible for it; if to himself, he must bear it. If in the enjoyment of their lawful rights by two persons, at the same time and place, reasonable care is exercised by both, and an injury accrues to one of them, it must be borne by the suffering party as a providential visitation. If such care is exercised by neither party, and an injury accrues to one of them, he must bear it, for he was himself in fault. And we held that when the gist of the action is negligence merely,—whether gross or slight, the plaintiff is not entitled to recover, when his own want of ordinary, or reasonable care, has essentially contributed to his injury; because he is himself in fault, and because of the difficulty, if not impossibility, of ascertaining in what proportions the parties respectively, by their negligence, have contributed to the production of the injury, and whether it would have been produced at all but by the combined operation of the negligence of both. When the injury is intentional, and designed, other considerations apply.

For anything this Court can see, the negligence of the defendants, however gross, might have been entirely harmless, but for the plaintiff's own wrongful contribution to the combined causes which produced his injury. And so too, for anything this Court can see, although the defendants' negligence was gross, and fully adequate to the production of the injury, yet the plaintiff's exercise of reasonable care would have saved him from its consequences.

In the recent case of *Park v. O'Brien*, 23 Conn. R. 339, this Court said, "It is necessary for the plaintiff to prove, first, negligence on the part of the defendant, and, secondly, that the injury to the plaintiff occurred in consequence of that negligence. But in order to prove

this latter point, the plaintiff must show that such injury was not caused, wholly, or in part, by his own negligence; for although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of the defendant's negligence." "Hence, to say that the plaintiff must show the latter" [the want of the plaintiff's concurring negligence], "is only saying that he must show that the injury was owing to the negligence of the defendant."

The same reasonable doctrine is sanctioned by other decisions, in our own Court, and elsewhere. *Birge v. Gardiner*, 19 Conn. R. 507; *Beers v. Housatonic R. R. Co.*, 19 Conn. R. 566, and cases there cited.

We think, therefore, that the charge of the Court, on this point, was wrong, and that a new trial ought to be granted.

In this opinion the other judges concurred, except Ellsworth, J., who was disqualified. *New trial to be granted.*

BREESE, J., IN GALENA, &c. R. CO. v. JACOBS.

1858. 20 *Illinois*, 496-497.

[After citing decisions in other jurisdictions.] It will be seen from these cases that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care as manifested by both parties; for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think, is, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to entitle him to recover. . . . We say, then, that in this as in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action.

THE MAX MORRIS.

[CURRY, LIBELLANT. MORRIS, CLAIMANT.]

1890. 137 *U. S. Supreme Court Reports*, 1.¹

THE case, as stated by the Court, was as follows:—

This was a suit in Admiralty, brought in the District Court of the United States for the Southern District of New York, by Patrick Curry against the steamer Max Morris.

¹ The argument for the appellant is omitted.—Ed.

The libel alleged that on the 27th of October, 1884, the libellant was lawfully on board of that vessel, being employed to load coal upon her by the stevedore who had the contract for loading the coal; that, on that day, the libellant, while on the vessel, fell from her bridge to the deck, through the negligence of those in charge of her, in having removed from the bridge the ladder usually leading therefrom to the deck, and in leaving open, and failing to guard, the aperture thus left in the rail on the bridge; that the libellant was not guilty of negligence; and that he was injured by the fall and incapacitated from labor. He claimed \$3000 damages.

The answer alleged negligence on the part of the libellant and an absence of negligence on the part of the claimant.

The District Court, held by Judge Brown, entered a decree in favor of the libellant for \$150 damages, and \$32.33 as one-half of the libellant's costs, less \$47.06 as one-half of the claimant's costs, making the total award to the libellant \$135.27. The opinion of the District Judge is reported in 24 Fed. Rep. 860. It appeared from that that the judge charged to the libellant's own fault all his pain and suffering and all mere consequential damages, and charged the vessel with his wages, at \$2 per day, for seventy-five working days, making \$150.

The claimant appealed to the Circuit Court, on the ground that the libel should have been dismissed. It was stipulated between the parties that the facts as stated in the opinion of the District Judge should be taken as the facts proved in the case, and that the appeal should be heard on those facts. Judge Wallace, who heard the case on appeal in the Circuit Court, delivered an opinion, in August, 1886, which is reported in 28 Fed. Rep. 881, affirming the decree of the District Court. No decree was made on that decision, but the case came up again in the Circuit Court on the 14th of March, 1887, the Court being held by Mr. Justice Blatchford and Judge Wallace, when a certificate was signed by them stating as follows: "The libellant was a longshoreman, a resident of the city and county of New York, and was, at the time when the said accident occurred, employed as longshoreman, by the hour, by the stevedore having the contract to load coal on board the steamship Max Morris. The injuries to the libellant were occasioned by his falling through an unguarded opening in the rail on the after-end of the lower bridge. The Max Morris was a British steamship, hailing from Liverpool, England. The defendant contends, as a matter of defence to said libel, that the injuries complained of by libellant were caused by his own negligence. The libellant contends that the injuries were occasioned entirely through the fault of the vessel and her officers. The Court finds, as a matter of fact, that the injuries to the libellant were occasioned partly through his own negligence and partly through the negligence of the officers of the vessel. It now occurs, as a question of law, whether the libellant, under the above facts, is entitled to a decree for divided damages. On this question the opinions of the judges are in con-

flict." On motion of the claimant, the question in difference was certified to this Court, and a decree was entered by the Circuit Court affirming the decree of the District Court and awarding to the libellant a recovery of \$135.27, with interest from the date of the decree of the District Court, and \$26.30 as the libellant's costs, in the Circuit Court, making a total of \$172. From that decree the claimant has appealed to this Court. Rev. Stat. §§ 652, 693; *Dow v. Johnson*, 100 U. S. 158.

Wilhelmus Mynderse, and *William Allen Butler*, for Morris, claimant and appellant.

James A. Patrick, for Curry, libellant and appellee.

MR. JUSTICE BLATCHFORD, after stating the case as above reported, delivered the opinion of the Court.

The question discussed in the opinions of Judge Brown and Judge Wallace, and presented to us for decision, is whether the libellant was debarred from the recovery of any sum of money, by reason of the fact that his own negligence contributed to the accident, although there was negligence also in the officers of the vessel. The question presented by the certificate is really that question, although stated in the certificate to be whether the libellant, under the facts presented, was entitled to a decree "for divided damages." It appears from the opinion of the District Judge that he imposed upon the claimant "some part of the damage" which his concurrent negligence occasioned, while it does not appear from the record that the award of the \$150 was the result of an equal division of the damages suffered by the libellant, or a giving to him of exactly one-half, or of more or less than one-half, of such damages.

The particular question before us has never been authoritatively passed upon by this Court, and is, as stated by the District Judge in his opinion, whether, in a Court of admiralty, in a case like the present, where personal injuries to the libellant arose from his negligence concurring with that of the vessel, any damages can be awarded, or whether the libel must be dismissed, according to the rule in common-law cases.

The doctrine of an equal division of damages in admiralty, in the case of a collision between two vessels, where both are guilty of fault contributing to the collision, had long been the rule in England, but was first established by this Court in the case of *The Schooner Catherine v. Dickinson*, 17 How. 170, and has been applied by it to cases where, both vessels being in fault, only one of them was injured, as well as to cases where both were injured, the injured vessel, in the first case, recovering only one-half of its damages, and, in the second case, the damages suffered by the two vessels being added together and equally divided, and the vessel whose damages exceeded such one-half recovering the excess against the other vessel. In the case of *The Schooner Catherine v. Dickinson*, *supra*, both vessels being held in fault for the collision, it was said by the Court, speaking by Mr.

Justice Nelson, p. 177, that the well-settled rule in the English admiralty was "to divide the loss," and that "under the circumstances usually attending these disasters" the Court thought "the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation."

This rule, recognized as one of an equal division of the loss, has been applied by this Court in the following cases: *Rogers v. Steamer St. Charles*, 19 How. 108; *Chamberlain v. Ward*, 21 How. 548; *The Washington*, 9 Wall. 513; *The Sapphire*, 11 Wall. 164; *The Ariadne*, 13 Wall. 475; *The Continental*, 14 Wall. 345; *Atlee v. Packet Co.*, 21 Wall. 389; *The Teutonia*, 23 Wall. 77; *The Sunnyside*, 91 U. S. 208; *The America*, 92 U. S. 432; *The Alabama*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *The Juniata*, 93 U. S. 337; *The Stephen Morgan*, 94 U. S. 599; *The Virginia Ehrman*, 97 U. S. 309; *The City of Hartford*, 97 U. S. 323; *The Civiltà*, 103 U. S. 699; *The Connecticut*, 103 U. S. 710; *The North Star*, 106 U. S. 17; *The Sterling*, 106 U. S. 647; and *The Manitoba*, 122 U. S. 97.

It may be well to refer particularly to some of these cases, which have a bearing upon the present question. In the case of *The Washington*, two vessels were held in fault for a collision which resulted in injuries to an innocent passenger on one of them, who proceeded against both in the same libel. This Court held that the damages to the passenger ought to be apportioned equally between the two vessels, with a reservation of a right in the libellant to collect the entire amount from either of them, in case of the inability of the other to respond for her portion. In that case, the rule of the equal division of damages was extended to damages other than those sustained by either or both of the vessels in fault.

In *Atlee v. Packet Co.*, a barge owned by the libellant was sunk by striking a stone-pier owned by the respondent, built in the navigable part of the Mississippi River. Both parties being found in fault by the District Court, that Court divided the damages sustained by the libellant, and rendered a decree against the owner of the pier for one-half of them. The Circuit Court held the owner of the pier to be wholly in fault, and decreed the entire damage against him. He having appealed, this Court, after two hearings of the case, reversed the decree of the Circuit Court and reinstated that of the District Court. In the opinion of this Court, delivered by Mr. Justice Miller, the case is treated as one of collision. The pier having been placed by the respondent in the navigable water of the Mississippi River without authority of law, this Court held him to be responsible for the damages sustained by the libellant from the striking of the pier by the barge. It held also that there was negligence on the part of the barge, and said (p. 395): "But the plaintiff has elected to bring his suit in an admiralty Court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this Court the course of proceeding is in many respects different and the rules of

decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common-law Court the defendant must pay all the damages or none. If there has been on the part of the plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty Court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other; and the plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum." This Court, therefore, treated the case as if it had been one of a collision between two vessels.

The case of *The Alabama* was like that of *The Washington*, where an innocent party recovered damages against two vessels, both of which were in fault in a collision. In that case, it is said in the opinion of the Court, delivered by Mr. Justice Bradley (p. 697), that "the moiety rule has been adopted for a better distribution of justice between mutual wrong-doers; and it ought not to be extended so far as to inflict positive loss on innocent parties."

The case of *The Atlas* was that of a suit against the Atlas by an insurance company for the loss of a canal-boat and her cargo while she was in tow of a tug, through a collision between the Atlas and the tug. The tug was not sued. The District and Circuit Courts, in view of the fact that the collision was caused by the mutual fault of the Atlas and the tug, decreed to the libellant, against the Atlas, one-half of its damages. This Court held that, as the owner of the cargo which was on board of the canal-boat was not in fault, the libellant was entitled to recover the entire amount of its damages from the Atlas, the tug not having been brought in as a party to the suit. By Rule 59 in admiralty, promulgated by this Court, March 26, 1883, 112 U. S. 743, the claimant or respondent in a suit for damage by collision may compel the libellant to bring in another vessel or party alleged to have been in fault.

The case of *The Juniata* is worthy of attention. In that case, one Pursglove, the owner of a steam-tug, filed a libel against the Juniata to recover for damage sustained by the tug by a collision between it and the Juniata, and also damages for personal injuries to himself. The District Court held both vessels to have been in fault, and made a decree of \$10,000 in favor of Pursglove, for one-half of his damages. This decree was affirmed by the Circuit Court and by this Court. It is quite evident from the report of the case that damages were awarded to Pursglove for his personal injuries, although his tug was held to have been in fault.

Some of the cases referred to show that this Court has extended the rule of the division of damages to claims other than those for damages to the vessels which were in fault in a collision.

In England, the common-law rule that a plaintiff who is guilty of contributory negligence can recover nothing, was made by statute to yield to the admiralty rule in respect to damages arising out of a collision between two ships, by subdivision (9) of section 25 of chap. 66 of 36 & 37 Vict., being the Judicature Act of Aug. 5, 1873, L. R. 8 Stat. 321, which provides as follows: "(9) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail." The same provision was enacted in the same language by subdivision (9) of section 28 of chap. 57 of 40 & 41 Vict., being the Judicature Act in relation to Ireland, of Aug. 14, 1877, L. R. 12 Stat. 362.

The admiralty rule of the division of damages was laid down by Sir William Scott, in 1815, in *The Woodrop-Sims*, 2 Dodson, 83, 85, where he says that if a loss occurs through a collision between two vessels, where both parties are to blame, the rule of law is "that the loss must be apportioned between them, as having been occasioned by the fault of both of them." This rule was approved by the House of Lords, on an appeal from Scotland, in *Hay v. Le Neve*, 2 Shaw, 395, in 1824.

The rule of the equal apportionment of the loss where both parties were in fault would seem to have been founded upon the difficulty of determining, in such cases, the degree of negligence in the one and the other. It is said by Cleirac (*Us et Coutumes de la Mer*, p. 68) that such rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of the parties, or when they see faults on both sides.

As to the particular question now presented for decision, there has been a conflict of opinion in the lower Courts of the United States. In the case of *Peterson v. The Chandos*, 4 Fed. Rep. 645, 649, in the District Court for the District of Oregon, which was a libel in admiralty against a vessel, for a personal injury, it was said by Judge Deady, that the libellant could not recover for an injury caused by his own negligence, which contributed to the result, even though the vessel was in fault. The same rule was recognized by him, in the same Court, in a suit in admiralty, in *Holmes v. Oregon Railway*, 5 Fed. Rep. 523, 538,¹ and by Judge Hughes, in the District Court for the Eastern District of Virginia, in *The Manhasset*, 19 Fed. Rep. 430.

On the other hand, Judge Pardee, in the Circuit Court for the

¹ In *Olsen v. Flavel*, 34 Fed. Rep. 477, Judge Deady distinctly held the law to be in accordance with the decision in the present cases.

Eastern District of Louisiana, in *The Explorer*, 20 Fed. Rep. 135, and *The Wanderer*, 20 Fed. Rep. 140, cases in admiralty where the libellant sued for personal injuries, and he and the vessel were both held in fault, laid it down as a rule that, in cases of marine torts, courts of admiralty could exercise a conscientious discretion, and give or withhold damages upon enlarged principles of justice and equity. In the first of those cases, the Court allowed to the libellant \$280 for the loss of forty days' time, at \$7 a day, and the sum of \$40 paid by him for his admission to a hospital, and the costs of the case, as the vessel's share of the expenses resulting from the injury to which the vessel contributed through the negligence of her master and officers. In the other case, it was held that, while the libellant could not be rewarded for his negligence at the expense of the vessel, she should be held responsible for her negligence, to the extent of paying for the direct care, attention, medical services and expenses required for the libellant. These last two cases proceed upon the same principle that appears to have been adopted by the District and Circuit Courts in the present case; and the same view was applied by the District Court for the Eastern District of New York, in *The Truro*, 31 Fed. Rep. 158; and by the District Court of the Eastern District of Virginia, in *The Eddystone*, 33 Fed. Rep. 925. This principle, it is contended, is sanctioned by the language used by this Court in *The Marianna Flora*, 11 Wheat. 1, 54; "Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law;" and in *The Palmyra*, 12 Wheat. 1, 17: "In the admiralty, the award of damages always rests in the sound discretion of the Court, under all the circumstances."

The rule of giving one-half of the damages has been applied by the District and Circuit Courts in the Southern District of New York, in cases where a boat and her cargo were lost or damaged through negligence on the part of a steam-tug which towed the boat, where there was fault also on the part of the boat. Those were not cases of collision, and there was no damage to the steam-tug, and she alone was sued for the loss. Such cases were those of *The William Murtaugh*, 3 Fed. Rep. 404, and 17 Fed. Rep. 260; *The William Cox*, 3 Fed. Rep. 645, affirmed by the Circuit Court, 9 Fed. Rep. 672; *Connolly v. Ross*, 11 Fed. Rep. 342; *The Bordentown*, 16 Fed. Rep. 270. Also, in cases where the vessel towed was held to be in fault for not being in proper condition, *Phila. Railroad Co. v. New England Transportation Co.*, 24 Fed. Rep. 505; and where a boat was injured by striking the bottom of a slip, in unloading at the respondent's elevator, the boat herself being also in fault, *Christian v. Van Tassel*, 12 Fed. Rep. 884; and where the vessel towed was old and unseaworthy, *The Syracuse*, 18 Fed. Rep. 828; *The Reba*, 22 Fed. Rep. 546. In *Snow v. Carruth*, 1 Sprague, 324, in the District Court for the Dis-

trict of Massachusetts, damage to goods carried by a vessel on freight was attributable partly to the fault of the carrier and partly to the fault of the shipper; and, it being impossible to ascertain for what proportion each was responsible, the loss was divided equally between them.

All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common-law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence, in a case like the present, should not wholly bar recovery. There would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the Court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good, will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libellant, in a case like the present, where their fault is clear, provided the libellant's fault, though evident, is neither wilful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery.

The necessary conclusion is, that the question whether the libellant, upon the facts found, is entitled to a decree for divided damages, must be answered in the affirmative, in accordance with the judgment below. This being the only question certified, and the amount in dispute being insufficient to give this Court jurisdiction of the whole case, our jurisdiction is limited to reviewing this question. *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223. Whether, in a case like this, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it.

Decree affirmed.

QUIMBY v. WOODBURY.

1885. 63 *New Hampshire*, 370.¹

DEBT, on the statute (G. L. c. 115, § 11), to recover double damages sustained by the plaintiff from being bitten by the defendant's dog.

It appeared that at the time of the injury the dog was in the plaintiff's pasture barking by a hole in the wall, and the plaintiff went to drive it away; but as to what he did in his efforts to effect that purpose, and whether his conduct and treatment of the animal were proper and reasonably necessary to that end, or whether he brought the injury upon himself by his ill-treatment of the dog, and by want of due care to avoid the injury, the evidence was conflicting.

The jury were instructed as follows: "The plaintiff had the legal right to expel the dog from his premises, doing whatever was reasonably necessary to effect his expulsion, acting with due care to prevent being injured; and if in the attempt to expel the dog he acted with due care, using such means only as were reasonably necessary, and was bitten, he can recover. If the plaintiff was bitten in consequence of not using due care in his conduct towards the dog, or if he wilfully, recklessly, or needlessly irritated or aggravated the dog, and in consequence of such conduct was bitten, he cannot recover, because the injury he received would be the result of his own carelessness or recklessness."

The plaintiff excepted to that part of the above instruction which required proof of due care from him, and requested the Court to charge that "the burden of proof is upon the defendant to establish the fact that the plaintiff, at the time he was bitten, was in the commission of a trespass or other tort." This instruction was refused, and the plaintiff excepted.

The jury did not agree, and on motion of the plaintiff, the questions raised by the foregoing exceptions were reserved for the opinion of the Court.

Copeland & Jones, for the plaintiff.

Chase & Streeter, for the defendant.

CLARK, J. The principle of law which requires the exercise of reasonable care to avoid doing injury to others, requires also the exercise of reasonable care to avoid being injured by the negligence of others, and as a general rule one cannot recover compensation for an injury occasioned by the mere negligence of another, which he might have avoided by the exercise of reasonable care. If the injury would not have happened to him but for his own want of ordinary care, he cannot legally charge to the negligence of the other party the consequences of his own carelessness. And this doctrine of contributory negligence

¹ Arguments omitted. — Ed.

applies to cases of injury by animals. Cool. Torts, 346; 1 Ad. Torts, § 261; Shear. & Red. Neg. § 199.

It is contended that the common-law rule has been changed by G. L., c. 115, §§ 10, 11, and that the doctrine of contributory negligence does not apply to cases arising under the statute. The provisions of the statute are as follows: "Sec. 10. Any person to whom or whose property any damage may be occasioned by a dog not owned or kept by said person, shall be entitled to recover of the person who owns, or keeps, or has said dog in possession, all damages which may be so occasioned, except in cases where the same have been occasioned to the party suffering such damage while engaged in the commission of a trespass or other tort." "Sec. 11. Every owner or keeper of a dog shall forfeit to every person injured by it double the amount of the damage sustained by him, to be recovered in an action of debt." The action is brought under section 11, and it is claimed that under this statute the liability of the owner or keeper of a dog is not affected by the negligence of the person injured. It is said that the statute is penal and should be construed strictly, and that its terms impose an absolute liability.

The statute is neither distinctively penal nor remedial. It is so far penal that it is not unconstitutional by reason of authorizing the recovery of double damages. *Craig v. Gerrish*, 58 N. H. 513. But it is not within the statute limiting the time within which suits founded on penal statutes must be brought. *Whitaker v. Warren*, 60 N. H. 20. It is penal so far as it imposes the payment of double damages as a forfeiture, and remedial so far as it provides for the recovery of damages as compensation for the injury done. But by whatever name it is called, whether penal or remedial, the statute is substantially remedial. It furnishes a statutory remedy for enforcing the common-law right of recovery of damages for the actual injury sustained, and a recovery under the statute is a bar to any subsequent action for the recovery of damages. The statute must receive a reasonable interpretation whatever its nature. The rule requiring penal statutes to be construed strictly, means only that they are not to be extended by implication so as to embrace cases or acts not fairly and reasonably within the prohibition or penalty of the statute; and in cases of doubtful construction, that interpretation should be adopted which restricts the operation and enforcement of the forfeiture. Where there is such an ambiguity as to leave reasonable doubt of the meaning, the penalty is not to be inflicted. Disregarding the general principle of contributory negligence, the language of section 11 imports an absolute liability. This interpretation gives a broader application to the statute than is contended for. It is said that sections 10 and 11 are to be construed together, and that the exception in section 10 of the right of a party to recover damages for injuries received while engaged in the commission of a trespass or other tort is to be regarded as applicable to section 11 also; and it is argued that the express mention of

this exception is to be construed as excluding any other exception to the absolute liability implied in the language of the statute.

In *Orne v. Roberts*, 51 N. H. 110, 113, it is said, in considering this statute, that it apparently originated in the idea that much damage was done by dogs, for which the injured person had no remedy, by reason of the practical difficulty of charging the owner with knowledge of the mischievous character of the dog, and therefore it was thought best to make the owner or keeper absolutely liable for the injuries caused by his dog, without regard to the fact whether he had knowledge of the vicious character of the animal or not. Assuming this view to be correct, that the purpose of the statute is to obviate the difficulty of showing the owner's knowledge of the vicious propensities of the dog, in an action for damages, a reasonable interpretation limits it to the accomplishment of that object, and the language of the statute is to be construed with reference to the established rule of law, that a party cannot recover for injuries resulting from his own negligence. In the interpretation of a statute, the general purpose is entitled to great weight in ascertaining the meaning of particular words; and if the literal meaning of particular words is inconsistent with the general purpose, or if the language used, if understood literally, is inconsistent with a well-settled principle of law of general application, there is grave reason to doubt whether the literal sense is the sense intended by the legislature.

A construction of the statute making the owner of a dog absolutely liable for injuries, regardless of the conduct of the party injured, might in some cases hold the owner responsible for injuries occasioned solely by the reckless carelessness of the party injured. It would make the owner liable to a person injured while intentionally exposing himself by worrying and irritating a dog for the purpose of testing his temper and disposition. Such a construction would be unreasonable. We think the rule of interpretation applicable to this statute is analogous to that applied to the statute making towns liable for damages happening from defective highways, which, although literally imposing an absolute and unqualified liability, is construed with the qualification that the party injured is not entitled to recover if his own negligence contributed to the injury.

As the statute is to be interpreted with reference to the general principle that a party cannot recover damages for the negligence of another if his own negligence contributed to the injury, the expressed exception that the injured party cannot recover if the injury is received while he is in the commission of a trespass or other tort, is not to be regarded as excluding the doctrine of contributory negligence. The purpose and effect of the exception is to limit the right of recovery, and not to extend it. The fact that the party injured is in the commission of a trespass or a tort may or may not contribute to the injury. The fact that a person injured by a dog is trespassing on the premises of the owner of the dog at the time of the injury may not in any re-

spect contribute to the injury. He might be injured in the same manner if he was rightfully on the premises by the owner's permission. The effect of the exception is to limit the liability of the owner by prohibiting a recovery in all cases where the party injured is engaged in the commission of a trespass or a tort, regardless of the fact whether he is chargeable with contributory negligence or not. It merely imposes the condition upon the injured party's right of recovery, that it must appear that he was not a trespasser when the injury was received, and the doctrine of contributory negligence is applicable to cases under the statute as at common law.

Case discharged.

CLEVELAND ROLLING MILL CO. v. CORRIGAN.

1889. 46 *Ohio State Reports*, 283.¹

ERROR to Circuit Court of Cuyahoga County.

The plaintiff below, John Corrigan, an infant under the age of fourteen, by his guardian, sued the Rolling Mill Company for damages suffered while in the defendants' employ, and which he alleged were caused by their negligence.

The answer of the defendants alleged, among other defences, that the injury occurred solely through the plaintiff's fault.

As to this ground of defence, the Court instructed the jury in part as follows:—

It was the duty of the plaintiff to use ordinary care and prudence; just such care and prudence as a boy of his age, of ordinary care and prudence, would use under like or similar circumstances. You should take into consideration his age, the judgment and knowledge he possessed.

Verdict and judgment for plaintiff.

The Company filed its petition in error.

Williamson, Beach & Cushing, for plaintiff in error.

Robison & Rogers, for defendant in error.

WILLIAMS, J. The only questions presented in this case are those arising upon the special instructions given by the Court in response to the request of the jury. These instructions, the plaintiff in error contends, are erroneous in their entirety and in detail.

1. First, it is claimed that the Court erred in the statement of the plaintiff's duty, in the opening proposition of the charge, wherein the jury were instructed that "it was the duty of the plaintiff to use ordinary care," which the Court defined to be "just such care as boys of that age, of ordinary care and prudence, would use under like circumstances," and that the jury "should take into consideration the age of

¹ Statement of facts abridged. Only so much of the case is given as relates to one point. Arguments omitted.—Ed.

the plaintiff, and the judgment and knowledge he possessed." We have found no decision of this Court upon the subject of the contributory negligence of infants, or the measure of care required of them. Elsewhere the decisions are conflicting. Each of three different rules on the subject has found judicial sanction. One rule requires of children the same standard of care, judgment, and discretion, in anticipating and avoiding injury, as adults are bound to exercise. Another wholly exempts small children from the doctrine of contributory negligence. Between these extremes a third and more reasonable rule has grown into favor, and is now supported by the great weight of authority, which is, that a child is held to no greater care than is usually possessed by children of the same age. Authors and judges, however, do not always employ the same language in giving expression to the rule. In *Beach on Contributory Negligence*, sec. 46, it is thus expressed: "An infant plaintiff who, on the one hand, is not so young as to escape entirely all legal accountability, and on the other hand is not so mature as to be held to the responsibility of an adult is, of course, in cases involving the question of negligence, to be held responsible for ordinary care, and ordinary care must mean, in this connection, that degree of care and prudence which may reasonably be expected of a child." The decisions enforcing this rule, that children are to be held responsible only for such degree of care and prudence as may reasonably be expected of them, taking due account of their age and the particular circumstances, are very numerous. "It is well settled," says Mr. Justice Hunt in *Railroad Company v. Stout*, 17 Wall. 657, "that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. . . . The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." In *Shearman & Redfield on Negligence*, sec. 73, it is said to be "now settled by the overwhelming weight of authority that a child is held, as far as he is personally concerned, only to the exercise of such care and discretion as is reasonably to be expected from children of his own age." Another author says, "A child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising." *Whittaker's Smith on Neg.*, 411.

(This rule appears to rest upon sound reason as well as authority.) To constitute contributory negligence in any case there must be a want of ordinary care and a proximate connection between such want of care and the injury complained of; and ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to use under similar circumstances.) Children constitute a class of persons of less discretion and judgment than adults, of which all reasonably informed men are aware. Hence ordinarily prudent men reasonably expect that children will exercise only the care and prudence of children, and no greater degree of care should be required of

them than is usual under the circumstances among careful and prudent persons of the class to which they belong.) (We think it a sound rule, therefore, that in the application of the doctrine of contributory negligence to children, in actions by them or in their behalf for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults, and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.)

That portion of the charge of the Court under discussion is in substantial conformity to this conclusion. The care and prudence which a boy of the plaintiff's age of ordinary care and prudence "would use under like and similar circumstances," as expressed in the charge, is such care as "is reasonably to be expected from a boy of his age," or "which boys of his age usually exercise," as the books express it. No different effect is given to the charge of which the plaintiff in error can complain, by the direction to the jury to take into consideration the age of the boy "and the judgment and knowledge he possessed." This did not diminish the degree of care required by the previous portion of the instruction.

[Remainder of opinion omitted.]

Judgment affirmed.

STONE, AS ADMINISTRATOR, v. DRY DOCK, &C. CO.

1889. 115 *New York Reports*, 104.¹

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 26, 1887, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

This was an action to recover damages for the alleged negligence in causing the death of plaintiff's intestate, a child of seven years and three or four months old.

The facts, so far as material, are stated in the opinion.

Adolph L. Sanger, for appellant.

John M. Scribner, for respondent.

ANDREWS, J. The nonsuit was placed on the ground that an infant seven years of age was *sui juris*, and that the act of the child in crossing the street in front of the approaching car was negligence on her part, which contributed to her death, and barred a recovery. We think the case should have been submitted to the jury.

The negligence of the driver of the car is conceded. His conduct

¹ Arguments and part of opinion omitted. — ED.

in driving rapidly along Canal Street at its intersection with Orchard Street, without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *Railroad Co. v. Gladmon*, 15 Wall. 401. It cannot be asserted as a proposition of law that a child just passed seven years of age is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*. *Kunz v. City of Troy*, 104 N. Y. 344. Infants under seven years of age are deemed incapable of committing crime, and by the common law such incapacity presumptively continues until the age of fourteen. An infant between those ages was regarded as within the age of possible discretion, but on a criminal charge against an infant between those years the burden was upon the prosecutor to show that the defendant had intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent. 1 Arch. 11. The Penal Code preserves the rule of the common law except that it fixes the age of twelve instead of fourteen as the time when the presumption of incapacity ceases. Penal Code, §§ 18, 19.

In administering civil remedies the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant three or four years of age could not be regarded as *sui juris*, and the same was said in another case of an infant five years of age. *Mangam v. Brooklyn R. R.*, *supra*; *Fallon v. Central Park, N. & E. R. R. Co.*, 64 N. Y. 13. On the other hand, it was said in *Cosgrove v. Ogden*, 49 N. Y. 255, that a lad six years of age could not be assumed to be incapable of protecting himself from danger in streets or roads, and in another case that a boy of eleven years of age was competent to be trusted in the streets of a city. *McMahon v. Mayor, &c.*, 33 N. Y. 642. From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. (It becomes, therefore, a question of fact for the jury where the inquiry is material unless the child is of so very tender years that the Court can safely decide the fact.) The trial Court misapprehended the case of *Wendell v. New York Central Railroad Company*, 91 N. Y. 420, in supposing that it decided, as a proposition of law, that a child of seven years was capable of exercising judgment so as to be chargeable with contributory negligence. It was assumed in that case, both on the trial and on appeal, that the child whose conduct was in question was capable of understanding, and did understand the peril of the situation, and the evidence placed it beyond doubt that he recklessly encountered the danger which resulted in his death. The boy was familiar with the crossing, and, eluding the flagman who tried to bar his way, attempted to run across the track in front of an approaching train in plain sight,

and unfortunately slipped and fell, and was run over and killed. It appeared that he was a bright, active boy, accustomed to go to school and on errands alone, and sometimes was intrusted with the duty of driving a horse and wagon, and that on previous occasions he had been stopped by the flagman while attempting to cross the track in front of an approaching train, and had been warned of the danger. The Court held, upon this state of facts, that the boy was guilty of culpable negligence. But the case does not decide, as matter of law, that all children of the age of seven years are *sui juris*.

We are inclined to the opinion that in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, and the fact is material as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. (This rule would seem to be consistent with the principle now well settled in this State, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action. In the present case the only fact before the jury bearing upon the capacity of the child whose death was in question was that she was a girl seven years and three months old. This, we think, did not alone justify an inference that the child was incapable of exercising any degree of care. But, assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years. This measure of care is all that the law exacts in such a case. *Thurber v. Harlem, B. M. & F. R. R. Co.*, 60 N. Y. 335.

[Remainder of opinion omitted.]

Judgment reversed.

STEINMETZ v. KELLY.

1880. 72 *Indiana*, 442.¹

FROM the Jefferson Circuit Court.

E. P. Ferris and *W. W. Spencer*, for appellant.

W. D. Wilson and *C. H. Wilson*, for appellee.

WORDEN, J. Action by the appellee against the appellant for assault and battery. The complaint consisted of three paragraphs, a demurrer to each of which, for want of sufficient facts, was overruled. The first, the only one to which any specific objection is made in this

¹ Part of opinion omitted. — ED.

Court, alleged that the defendant, on, &c., "violently and unlawfully assaulted the plaintiff, and struck him, and also threw him, the plaintiff, from the house of the defendant on to the street pavement, in front of the defendant's house, with great violence, fracturing," &c.

The defendant answered:—

First. [That there was a justifiable occasion for his use of force, and that he used no more force than was necessary.]

Second. General denial.

The plaintiff replied by general denial to the first paragraph of the answer. Trial by jury, verdict and judgment for the plaintiff for \$500.

The counsel for the appellant in their brief say: "We shall not stop now to discuss the merits of the complaint further than to say that the first paragraph of the complaint shows an eviction from the defendant's premises, and we have thought that the paragraph should aver that the injury occurred without the fault of the plaintiff." The paragraph does not charge an injury to the plaintiff arising out of the negligence of the defendant, but an unlawful assault upon, and battery of, the plaintiff's person. In such cases it is not necessary to allege that the plaintiff was without fault, or, in other words, was not guilty of contributory negligence. There remains nothing more to be considered except such questions as arise on a motion for a new trial.

[Omitting part of opinion.]

The defendant asked that the following interrogatory be answered by the jury, if they should return a general verdict, viz.: "Did the fault or negligence of the plaintiff contribute in any way to the injury of the plaintiff, received on the evening of the 3d of March, 1876?" The Court declined to direct the jury to answer the interrogatory, and in this we think no error was committed.

The right of the plaintiff to recover depended not upon any negligence of the defendant, but upon the assault and battery, which, if perpetrated at all by the defendant, was intentional and purposed. It may be that the defendant did not intend to inflict so severe an injury upon the plaintiff as seemed to result from the excess of force applied by him; but it does not therefore follow that he did not intend to apply that force.

The doctrine that contributory negligence on the part of the plaintiff will defeat his action has been generally applied in actions based on the negligence of the defendant, in short, in cases involving mutual negligence. But it has also been applied in some cases where the matter complained of was not negligence merely, but the commission of some act in itself unlawful, without reference to the manner of committing it, as the wilful and unauthorized obstruction of a highway, whereby a person is injured. *Butterfield v. Forrester*, 11 East, 60; *Dygart v. Schenck*, 23 Wend. 446.

The doctrine, however, can have no application to the case of an

intentional and unlawful assault and battery, for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery.

An intentional and unlawful assault and battery inflicted upon a person is an invasion of his right of personal security, for which the law gives him redress, and of this redress he cannot be deprived on the ground that he was negligent and took no care to avoid such invasion of his right. /,

The trespass was purposely committed by the defendant. If he could excuse it on the ground of the alleged misconduct of the plaintiff, and if he employed no more force than was necessary and reasonable, that was a complete defence. Otherwise the plaintiff, if he made out the trespass, was entitled to recover, and no negligence on his part, as before observed, could defeat his action. The case of *Ruter v. Foy*, 46 Iowa, 132, is in point. There the plaintiff alleged that the defendant had assaulted and beat her with a pitchfork. On the trial the defendant asked, but the Court refused, the following instruction: "If you find from the evidence that the plaintiff was injured, or contributed to her injury, by her own act or negligence, defendant would not be liable for assault and battery upon her, and plaintiff cannot recover." On appeal the Court said upon this point: "The doctrine of contributory negligence has no application in an action for assault and battery."

The case here is entirely unlike that of *Brown v. Kendall*, 6 Cush. 292. There the defendant's dog and another were fighting. The defendant was beating the dogs with a stick in order to separate them, in doing which he accidentally hit the plaintiff in the eye with the stick. It was held that trespass *vi et armis* was the proper form of action, because the injury to the plaintiff was immediate; but that as the parting of the dogs was a proper and lawful act, and as the hitting of the plaintiff was not intentional, but a mere accident or casualty, the plaintiff could not recover at all without showing a want of ordinary care on the part of the defendant; and then that contributory negligence on the part of the plaintiff would defeat the action.

Although, according to the common-law system of pleading, trespass *vi et armis* was the proper form of action in such case, the essential and only ground on which the action could rest was the negligence of the defendant in doing an act lawful in itself whereby the plaintiff was injured, and this is so as fully as if the plaintiff had framed his declaration in case for the negligence.

The difference between that case and the present is substantial and vital. In that case the battery was unintentional, and the defendant therein was guilty of no wrong save his negligence. Here the defendant intentionally perpetrated the battery, and the plaintiff's right to recover was not based upon the negligence of the defendant at all.

[Omitting part of opinion.]

We find no error in the record.

The judgment below is affirmed with costs.

Petition for a rehearing overruled.

Judgment affirmed.

KRUM ET AL. v. ANTHONY.

1886. 115 *Pennsylvania State*, 431.¹

ERROR to Common Pleas, Lehigh County.

Case by Anthony against Krum and Peters, for death of a horse, alleged to have been occasioned by the negligence of the defendants in not making and keeping in repair a fence between the lands of plaintiff and the defendants, through which neglect the plaintiff's horse strayed into the defendants' field and fell into a stone quarry and was killed.

The parties occupied adjoining tracts of land, and there was a quarry on defendants' tract near the line. Plaintiff claimed that there was a parol agreement between previous owners of the two tracts, whereby the part of the fence opposite the quarry was to be kept up by the owner of the tract now occupied by the defendants.

The fence near the quarry was down at the time of the damage to the plaintiff's horse, and had been so for a long time. Plaintiff knew that the fence was down, and was fully acquainted with the condition of the land. He put a horse to pasture at night in the field adjoining the quarry. During the night the horse strayed on defendants' premises, fell into the quarry, and was killed.

The Court instructed the jury that, if there was such an agreement as claimed by plaintiff, and it was never changed, then the defendants were bound to maintain that part of the fence adjoining the quarry. The Court also charged that, if the jury found that it was the duty of the defendants to make the fence, and that they neglected and refused to make it, and that, owing to that neglect, the horse was lost, then the defendants were liable.

The defendants requested instructions (in substance), that, if plaintiff knew that the fence was no longer there, and knew the open and exposed condition of the quarry, and with such knowledge put his horse to pasture in the adjoining field, plaintiff would be guilty of contributory negligence, and could not recover. The instructions were refused; and the refusal constituted the third and fourth assignments of error.

Verdict for plaintiff, and judgment thereon. Defendants brought error.

¹ Statement of facts abridged. Arguments omitted. — ED.

Edward Harvey and *John D. Stiles* (*Levi Smoyer* and *H. G. Stiles* with them) for plaintiffs in error.

James S. Biery, for defendant in error.

Mr. Justice GREEN delivered the opinion of the Court, March 7th, 1887.

We think the learned judge of the Court below was in error in his treatment of the subject of contributory negligence. His view seems to have been that if the defendants were subject to a contract duty to maintain the division fence between them and the plaintiff, at the place of the accident, [and] had neglected to perform that duty, in consequence of which the plaintiff's horse was lost, the liability of the defendants was fixed whether the plaintiff's negligence contributed to the injury or not. We so understand the part of the charge covered by the fourth assignment and the answer to the defendants' third point. We are unable to agree with that view of the subject. It ignores entirely the consequences of the plaintiff's negligence contributing to the injury for which the suit is brought. Just here we think is the point in respect of which the learned judge was mistaken.

The action was not brought to recover damages for the breach of a contract to maintain a fence. On the contrary it was an action of case sounding in tort to recover damages for the loss of a horse, resulting from the negligence of the defendants. This negligence is the very gist of the action. So far as the subject of contributory negligence is concerned it is precisely the same as if the action had been brought to recover damages for a personal injury. As we understand the law, in any case where an injury by the negligence of the defendant is the basis of the action, the right to recover may be resisted by proof that the plaintiff's own negligence contributed to the injury. If such negligence was in part the occasion of the injury which the plaintiff alleges he has sustained, the law will not discriminate between the negligence of the plaintiff which contributed to the injury and the negligence of the defendant which also contributed to it. It simply will not allow a recovery in such a case. The facts presented by way of hypothesis in the defendants' third point were such as, if found by the jury, undoubtedly constituted contributory negligence on the part of the plaintiff, and as there was evidence in support of them, the point should have been affirmed.

The language covered by the fourth assignment is obnoxious to the same objection, as it overlooks entirely the effect of the plaintiff's contributory negligence. The third and fourth assignments of error are sustained, and upon them the judgment is reversed.

Judgment reversed and venire de novo awarded.

DONOVAN ET AL. v. HANNIBAL & ST. JOSEPH RAILROAD
COMPANY, APPELLANT.1886. 89 *Missouri*, 147.¹

APPEAL from Buchanan Circuit Court. Hon. J. P. Grubb, Judge.

Smith & Krauthoff, for appellant.*Doniphan & Reed*, for respondent.

BLACK, J. This is a suit for double damages under section 809, Revised Statutes,² for injuries to cattle. The facts disclosed on the trial are as follows: Defendant's road runs through a farm owned by the plaintiff, Donovan. He enclosed fifty acres by building a fence on three sides, the railroad constituting the fourth side. Before erecting the fence he notified defendant of his intention and requested its proper agents to fence the road, stating at the same time that the land was lower than the track, and if it should rain his cattle would go upon the road. He made a like request after the fence had been completed, saying then that the grass was going to waste. He at the same time offered to build the fence for defendant at its cost, but this proposition was rejected, the agent saying that they were better prepared to build fences than plaintiff. The agent then, as he had before, promised to make the fence. From two to four weeks later Donovan, and McKinley, the other plaintiff, turned some forty head of their cattle on the pasture. A son of one of the plaintiffs paid some attention to the cattle for a time, keeping them off the road. On the night of the third day that the cattle were in the pasture it rained, and they then went on the road, and six or eight were damaged by the defendant's cars running upon them.

The many constitutional questions as to the validity of section 809, raised in the trial Court and preserved in the record, have been so often ruled against the appellant that further notice need not be taken of them.

The defendant offered no evidence, but asked the following instruction, which was refused:—

"The jury are instructed that if the evidence shows that if the plaintiff turned his said stock into his lot where they were injured, knowing that locomotives and trains of cars were running at all hours of the day

¹ Arguments omitted. — ED.

² "Every railroad corporation . . . shall erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands; . . . and until fences . . . shall be made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines, or cars to . . . animals on said road or by reason of any . . . animals escaping from, or coming upon said lands, fields, or inclosures, occasioned in either case by the failure to construct or maintain such fences. . . . After such fences . . . shall be duly made and maintained, said corporation shall not be liable for any such damage, unless negligently or wilfully done." . . . — Rev. Stat. Missouri, section 809. — ED.

and night on the defendant's railroad track, and knew that said track crossed his said lot, and that no fence of any kind was on either side of the railroad track, and that such locomotives could not be operated on said track without running near said animals, and that said animals were in danger of receiving injury from such engines and cars, then he was guilty of such negligence as will bar a recovery in this action."

The defendant answered alone by way of a general denial. Contributory negligence is a matter of defence, and must be pleaded to be available as a defence. No such issue of fact was presented in this case, and for these reasons the instruction was properly refused. Had such a defence been stated in the answer, still the instruction should have been refused, for it fails to submit any question of negligence on the part of the plaintiffs to the jurors. It assumes that the facts therein hypothetically stated, in and of themselves, constitute negligence. The facts recited do not necessarily lead to such a conclusion.

Again, the plaintiff had the undoubted right to enclose his pasture and when enclosed to make use of it for a pasture. Those cases cited where animals were at large contrary to some law, and strayed upon the railroad and were killed or damaged, can have no possible application to this case. By statute it is made the duty of the defendant to fence its road, and it is made liable to the owner of cattle for double the amount of all damages done to them occasioned by reason of the failure to fence the road. The landowner may, it is true, build the fence and then recover the value from the railroad company, but there is no duty resting upon him to build the fence. The duty is upon the company, and it cannot shift the duty upon the land proprietor. Neither is the land owner deprived of the use of his lands because of the neglect of the company to construct fences as the law says it shall. As is said in Thompson on Negligence, volume 1, page 531: "There is no negligence in his pasturing his cattle upon his own premises, although he is aware of the defective condition of the fence, which it is the duty of the company to maintain between it and the railroad track. He cannot be deprived of the ordinary and proper use of his property by the failure of the railroad company to perform its duty." The same is equally true where there is a total failure to fence. In every case where the railroad passes through enclosed fields, and is not fenced, there is more or less danger to cattle and other animals. This danger is known to every man of common observation. If these facts will defeat the owner in a suit under the statute, then the statute ceases to be of any avail to one who is diligent enough to fence up his lands. The statute is designed to furnish a remedy to the owner of the stock, as well as to protect the lives of persons travelling on the railroad. It subverts a double purpose. *Parish v. Railroad*, 63 Mo. 286. The principle contended for here by the appellant nullifies the statute as to persons who see fit to enclose their lands. It cannot be the law. Perhaps there are authorities in some of the States which would lead to a different conclusion, but we decline to follow them.

Our conclusion is that there was no evidence in the case to justify the Court, in any event, in giving any instruction upon contributory negligence, though the pleadings had been framed to that end.

The judgment is affirmed. All concur.

KELLOGG v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

1870. 26 *Wisconsin*, 223.¹

ACTION to recover damages for destruction of hay, sheds, stables, &c., by a fire alleged to have originated in the negligence of the railway company. Fire was communicated by sparks from railroad engine to dry grass, weeds, &c., which had been allowed to accumulate on defendant's land, on both sides of the track; and thence the fire passed upon plaintiff's land where dry grass and weeds had also been permitted to accumulate. A strong wind was blowing from the track towards plaintiff's buildings, about one hundred and forty rods distant. The dry and combustible matter on the railroad land and on plaintiff's land, together with the wind, served to carry the fire to plaintiff's buildings, &c., which were destroyed.

Trial; verdict and judgment for plaintiff. Defendant appealed.

Pease & Ruger, for appellant.

Williams & Sale, for respondent.

DIXON, C. J. All the authorities agree that the presence of dry grass and other inflammable material upon the way of a railroad, suffered to remain there by the company without cause, is a fact from which the jury may find negligence against the company. The cases in Illinois, cited and relied upon by counsel for the defendant, hold this. They hold that it is proper evidence for the jury, who may find negligence from it, although it is not negligence *per se*. *Railroad Co. v. Shanefelt*, 47 Ill. 497; *Illinois Central Railroad Co. v. Nunn*, 51 id. 78; *Railroad Co. v. Mills*, 42 id. 407; *Bass v. Railroad Co.*, 28 id. 9. The Court below ruled in the same way, and left it for the jury to say whether the suffering of the combustible material to accumulate upon the right of way and sides of the track, or the failure to remove the same, if the jury so found, was or was not, under the circumstances, negligence on the part of the company. No fault can be found with the instructions in this respect; and the next question is as to the charge of the Court, and its refusal to charge, respecting the alleged negligence of the plaintiff contributing, as it is said, to the loss or damage com-

¹ Statement of facts abridged. Arguments omitted. Only such portion of the two opinions of Dixon, C. J., are given as relate to one question. The dissenting opinion of Paine, J., is omitted. — ED.

plained of. This is the leading and most important question in the case. It is a question upon which there is some conflict of authority.

The facts were, that the plaintiff had permitted the weeds, grass, and stubble, to remain upon his own land immediately adjoining the railway of the defendant. They were dry and combustible, the same as the weeds and grass upon the right of way, though less in quantity, because within the right of way no mowing had ever been done, and the growth was more luxuriant and heavy. The plaintiff had not cut and removed the grass and weeds from his own land, nor ploughed in or removed the stubble, so as to prevent the spread of fire in case the same should be communicated to the dry grass and weeds upon the railroad, from the engines operated by the defendant. The grass, weeds, and stubble, upon the plaintiff's land, together with the wind, which was blowing pretty strongly in that direction, served to carry the fire to the stacks, buildings, and other property of the plaintiff, which were destroyed by it, and which were situated some distance from the railroad. The fire originated within the line of the railroad, and near the track, upon the land of the defendant. It was communicated to the dry grass and other combustible material there, by coals of fire dropped from an engine of the defendant passing over the road. The evidence tends very clearly to establish these facts, and under the instructions the jury must have so found. The plaintiff is a farmer, and, in the particulars here in controversy, conducted his farming operations the same as other farmers throughout the country. It is not the custom anywhere for farmers to remove the grass or weeds from their waste lands, or to plough in or remove their stubble, in order to prevent the spread of fire originating from such causes.

Upon this question, as upon the others, the Court charged the jury that it was for them to say whether the plaintiff was guilty of negligence, and, if they found he was, that then he could not recover. On the other hand, the defendant asked an instruction to the effect that it was negligence *per se* for the plaintiff to leave the grass, weeds, and stubble upon his own land, exposed to the fire which might be communicated to them from the burning grass and weeds on the defendant's right of way, and that for this reason there could be no recovery on the part of the plaintiff. The Court refused to give the instruction, and, I think, rightly. The charge upon this point, as well as upon the other, was quite as favorable to the defendant as the law will permit, and even more so than some of the authorities will justify. The authorities upon this point are, as I have said, somewhat in conflict. The two cases first above cited from Illinois hold that it is negligence on the part of the adjoining landowner not to remove the dry grass and combustible material from his own land under such circumstances, and that he cannot recover damages where the loss is by fire thus communicated. Those decisions were by a divided Court, by two only of the three judges composing it. They rest upon no satisfactory grounds, whilst the reasons found in the opinions of the dissenting judge are very strong

to the contrary. Opposed to these are the unanimous decisions of the courts of New York, and of the English Court of Exchequer, upon the identical point. *Cook v. Champlain Transportation Co.*, 1 Denio, 91; *Vaughan v. Taff Vale Railway Co.*, 3 Hurl. and Nor. 743; *Same v. Same*, 5 id. 679. These decisions, though made many years before the Illinois cases arose, are not referred to in them. The last was the same case on appeal in the Exchequer Chamber, where, although the judgment was reversed, it was upon another point. This one was not questioned, but was affirmed, as will be seen from the opinions of the judges, particularly of Cockburn, C. J., and Willes, J. The reasoning of those cases is, in my judgment, unanswerable. I do not see that I can add anything to it. They show that the doctrine of contributory negligence is wholly inapplicable,—that no man is to be charged with negligence because he uses his own property or conducts his own affairs as other people do theirs, or because he does not change or abandon such use, and modify the management of his affairs, so as to accommodate himself to the negligent habits or gross misconduct of others, and in order that such others may escape the consequences of their own wrong, and continue in the practice of such negligence or misconduct. In other words, they show that no man is to be deprived of the free, ordinary, and proper use of his own property by reason of the negligent use which his neighbor may make of his. He is not his neighbor's guardian or keeper, and not to answer for his neglect. The case put by the Court of New York, of the owner of a lot who builds upon it in close proximity to the shop of a smith, is an apt illustration. Or let us suppose that A. and B. are proprietors of adjoining lands. A. has a dwelling-house, barns, and other buildings upon his, and cultivates some portion of it. B. has a planing mill, or other similar manufacturing establishment upon his, near the line of A., operated by steam. B. is a careless man, habitually so, and suffers shavings and other inflammable material to accumulate about his mills and up to the line of A., and so near to the fire in the mill that the same is liable at any time to be ignited. A. knows this, and remonstrates with B., but B. persists. Upon A.'s land, immediately adjoining the premises of B., it is unavoidable, in the ordinary course of husbandry, or of A.'s use of the land, that there should be at certain seasons of the year, unless A. removes them, dry grass and stubble, which, when set fire to, will endanger his dwelling-house and other property of a combustible nature, especially with the wind blowing in a particular direction at the time. It may be a very considerable annual expense and trouble to A. to remove them. It may require considerable time and labor, a useless expenditure to him, diverting his attention from other affairs and duties. The constant watching to guard against the carelessness and negligence of B. is a great tax upon his time and patience. The question is: Does the law require this of him, lest, in some unguarded moment, the fire should break out, his property be destroyed, and he be remediless? If the law does so require, if it imposes on him the duty of guarding against B.'s

negligence, and of seeing that no injury shall come from it, or, if it does come, that it shall be his fault and not B.'s, it is important to know upon what principle it is that the burden is thus shifted from B. to himself. I know of no such principle, and doubt whether any Court could be found deliberately to announce or affirm it. And yet such is the result of holding the doctrine of contributory negligence applicable to such a case. A. is compelled, all his lifetime, at much expense and trouble, to watch and guard against the negligence of B., and to prevent any injuries arising from it, and for what? Simply that B. may continue to indulge in such negligence at his pleasure. And he does so with impunity. The law affords no redress against him. If the property is destroyed, it is because of the combustible material on A.'s land, which carries the fire, and which is A.'s fault, and A. is the loser. No loss can ever possibly overtake him. A. is responsible for the negligence, but not he himself. He kindles the fire, and A. stands guard over it. He sets the dangerous element in motion, and uses and operates it for his own benefit and advantage, negligently as he pleases, whilst A., with sleepless vigilance, sees to it that no damage is done, or if there is, that he will be the sufferer. This is the *reductio ad absurdum* of applying the doctrine of contributory negligence in such a case. And it is absurd, I care not by what Court or where applied.

Now the case of a railroad company is like the case of an individual. Both stand on the same footing with respect to their rights and liabilities. Both are engaged in the pursuit of a lawful business, and are alike liable for damage or injury caused by their negligence in the prosecution of it. Fire is an agent of an exceedingly dangerous and unruly kind, and, though applied to a lawful purpose, the law requires the utmost care in the use of all reasonable and proper means to prevent damage to the property of third persons. This obligation of care, the want of which constitutes negligence according to the circumstances, is imposed upon the party who uses the fire, and not upon those persons whose property is exposed to danger by reason of the negligence of such party. Third persons are merely passive, and have the right to remain so, using and enjoying their own property as they will, so far as responsibility for the negligence of the party setting the unruly and destructive agent in motion is concerned. If he is negligent, and damage ensues, it is his fault and cannot be theirs, unless they contribute to it by some unlawful or improper act. But the use of their own property as best suits their own convenience and purposes, or as other people use theirs, is not unlawful or improper. It is perfectly lawful and proper, and no blame can attach to them. He cannot, by his negligence, deprive them of such use, or say to them, "Do this or that with your property, or I will destroy it by the negligent and improper use of my fire." The fault, therefore, in both a legal and moral point of view, is with him, and it would be something strange should the law visit all the consequences of it upon them. The law does not do so, and it is an utter perversion of the maxim *sic utere tuo, etc.*, thus to

apply it to the persons whose property is so destroyed by the negligence of another. It is changing it from "So use your own as not to injure another's property," to "So use your own that another shall not injure your property," by his carelessness and negligence. It would be a very great burden to lay upon all the farmers and proprietors of lands along our extensive lines of railway, were it to be held that they are bound to guard against the negligence of the companies in this way,—that the law imposes this duty upon them. Always burdensome and difficult, it would, in numerous instances, be attended with great expense and trouble. Changes would have to be made in the mode of use and occupation, and sometimes the use abandoned, or at least all profitable use. Houses and buildings would have to be removed, and valuable timber cut down and destroyed. These are, in general, very combustible, especially at particular seasons of the year. The presence of these along or near the line of the railroad would be negligence in the farmer or proprietor. In the event of their destruction by the negligence of the company, he would be remediless. He must remove them, therefore, for his own safety. His only security consists in that. He must remove everything combustible from his own land in order that the company may leave all things combustible on its land and exposed without fear of loss or danger to the company to being ignited at any moment by the fires from its own engines. If this duty is imposed upon the farmers and other proprietors of adjoining lands, why not require them to go at once to the railroad and remove the dry grass and other inflammable material there? There is the origin of the mischief, and there the place to provide securities against it. It is vastly easier, by a few slight measures and a little precaution, to prevent the conflagration in the first place than to stay its ravages when it has once begun, particularly if the wind be blowing at the time, as it generally is upon our open prairies. With comparatively little trouble and expense upon the road itself, a little labor bestowed for that purpose, the mischief might be remedied. And this is an additional reason why the burden ought not to be shifted from the company upon the proprietor of the adjoining land; although, if it were otherwise, it certainly would not change what ought to be the clear rule of law upon the subject.

And the following cases will be found in strict harmony with those above cited, and strongly to sustain the principles there laid down, and for which I contend: *Martin v. Western Union Railroad Co.*, 23 Wis. 437; *Piggott v. Eastern Counties R. R. Co.*, 54 E. C. L. 228; *Smith v. London and Southwestern R. R. Co.*, Law Reports, 5 C. P. 98; *Vaughan v. Menlove*, 7 C. & P. 525 [32 E. C. L. 613]; *Hewey v. Nourse*, 54 Me. 256; *Turberville v. Stampe*, 1 Ld. Raym. 264; s. c. 1 Salk. 13; *Pantam v. Isham*, id. 19; *Field v. N. Y. C. R. R.*, 32 N. Y. 339; *Bachelor v. Heagan*, 18 Maine, 32; *Barnard v. Poor*, 21 Pick. 378; *Fero v. Buffalo and State Line R. R. Co.*, 22 N. Y. 209; *Fremantle v. The London and Northwestern R. R. Co.*, 100 E. C. L. 88; *Hart v. Western Railroad Co.*, 13 Met. 99; *Ingersoll v.*

Stockbridge & Pittsfield R. R. Co., 8 Allen, 438; *Perley v. Eastern Railroad Co.*, 98 Mass. 414; *Hooksett v. Concord Railroad*, 38 N. H. 242; *McCready v. Railroad Co.*, 2 Strobh. Law R. 356; *Cleveland v. Grand Trunk Railway Co.*, 42 Vt. 449; 1 Bl. Comm. 131; Com. Dig. Action for Negligence (A. 6).

It is true that some of these cases arose under statutes creating a liability on the part of railroad companies, but that does not affect the principle. Negligence in the plaintiff, contributing to the loss, is a defence to an action under the statutes, the same as to an action at common law. 8 Allen, 440; 6 id. 87.

COLE, J., concurred.

PAINE, J., delivered a dissenting opinion.

Judgment affirmed.

Defendants moved for a rehearing.

Pease & Ruger argued in support of the motion.

DIXON, C. J. (Sept. 21, 1871.) . . . And the majority of the Court also still adheres to the position that the failure of the plaintiff to remove the dry grass or stubble from his own land in order to prevent the spread or communication of fire set by the default or misconduct of the defendant, was not wrongful and improper on his part, not a culpable omission of duty by which he may be said to have co-operated in the destruction of his own property. We still think that the law imposed no such duty upon him. In the exercise of his lawful rights, every man has a right to act on the belief that every other person will perform his duty and obey the law; and it is not negligence to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person. *Jetter v. New York & Harlem R. R. Co.*, 2 Keyes, 154; *Earhart v. Youngblood*, 27 Pa. St. 332. The rule of law on this subject, sustained by numerous authorities, is well stated in Shearman and Redfield on Negligence, sec. 31, as follows: "As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant. Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may possibly be exposed by such negligence, or even to refrain absolutely from pursuing his usual course on account of risks to which he is probably exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury, if he has adopted the course which most prudent men would take under similar circumstances." And see particularly *Newson v. Railroad Co.*, 29 N. Y. 390; *Ernst v. Railroad Co.*, 35 N. Y. 28; *Railroad Co. v. Ogier*, 35 Pa. St. 60; *Clayards v. Dethick*, 12 Q. B. 439; and *Johnson v. Belden*, 2 Lansing, 437. And in section 6, the same authors correctly observe that the law makes no unreasonable demands; that no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the same circum-

stances, even though, if he had used them, the injury would certainly have been avoided. In *Vaughan v. Taff Vale Railway Co.*, last above cited, it appeared that in the plaintiff's wood adjoining the railway, "there was a great quantity of dry grass, of a highly inflammable nature. The wood had frequently been set on fire by sparks from the locomotives, and on four occasions the defendants had paid for the damage. In 1853 [the fire in question having occurred in 1856], the plaintiff wrote to the secretary of the company: 'No fire was known in the memory of man in the wood before the Aberdon Railway was made; since it has been made, four or five times the wood has been ignited. Any one looking at it can easily satisfy himself that in a dry season the wood is just about as safe a state as a barrel of gunpowder at Cyforthfa Rolling Mill.' The plaintiff had taken no steps to clear away the accumulation of dry grass and fallen branches in the wood." Upon this evidence the judge refused to leave the question to the jury, "whether the plaintiff had not been guilty of negligence in permitting the wood to be in a combustible state by not properly clearing it," saying, that he thought there was no duty on the part of the plaintiff to keep his wood in any particular state. This ruling was affirmed on the proceeding to show cause against a new trial, in the following language by Bramwell, B., delivering the judgment of the Court: "It remains to notice another point made by the defendants. It was said that the plaintiff's land was covered with very combustible vegetation, and that he contributed to his own loss, and Mr. Lloyd very ingeniously likened the case to that of an overloaded barge swamped by a steamer. We are of opinion this objection fails. *The plaintiff used his land in the natural and proper way for the purposes for which it was fit. The defendants come to it, he being passive, and do it mischief.* In the case of the overloaded barge, the owner uses it in an unnatural and improper way, and goes in search of the danger, having no right to impede another natural and proper way of using a public highway. We therefore think the direction was right, the verdict satisfactory, and the rule must be discharged."

The learned counsel strongly combat this position, and argue that, if logically carried out, the doctrine would utterly abrogate the rule that a party cannot recover damages where, by the exercise of ordinary care, he could have avoided the injury; and so, in the present case, after discovering the fire, the plaintiff might have leaned on his plough-handles and watched its progress, without effort to stay it, where such effort would have been effectual, and yet have been free from culpable negligence. The distinction is between a known, present, or immediate danger, arising from the negligence of another,—that which is imminent and certain, unless the party does or omits to do some act by which it may be avoided,—and a danger arising in like manner, but which is remote and possible or probable only, or contingent and uncertain, depending on the course of future events, such as the future conduct of the negligent party, and other as yet unknown and fortuitous circum-

stances. The difference is that between realization and anticipation. A man in his senses, in face of what has been aptly termed a "seen danger" (Shearman and Redfield, § 34, note 1), that is, one which presently threatens and is known to him, is bound to realize it, and to use all proper care and make all reasonable efforts to avoid it, and if he does not, it is his own fault; and he having thus contributed to his own loss or injury, no damage can be recovered from the other party, however negligent the latter may have been. But, in case of a danger of the other kind, one which is not "seen," but exists in anticipation merely, and where the injury may or may not accrue, but is probable or possible only from the continued culpable negligence of another, there the law imposes no such duty upon the person who is or may be so exposed, and he is not obliged to change his conduct or the mode of transacting his affairs, which are otherwise prudent and proper, in order to avoid such anticipated injuries or prevent the mischiefs which may happen through another's default and culpable want of care.

Rehearing denied.

CHAPTER V.

IMPUTED NEGLIGENCE.

THE BERNINA.

[IN THE COURT OF APPEAL.]

1887. *Law Reports*, 12 *Probate Division*, 58.¹

APPEAL from a judgment of Butt, J. (in the Probate, Divorce, and Admiralty Division, reported in 11 Prob. Div. 31), on a special case stated for the opinion of the Court, in three actions brought *in personam* against the owners of the steamer *Bernina*.

Butt, J., held, on the authority of *Thorogood v. Bryan*, 8 C. B. 115, that the plaintiffs were unable to recover against the defendants, and dismissed the actions.

The plaintiffs appealed.

Bucknill, Q. C., and *Nelson*, for plaintiffs.

Sir W. Phillimore and *Barnes*, for defendants.

LINDLEY, L. J. This was a special case. Three actions are brought in the Admiralty Division of the High Court by the respective legal personal representatives of three persons on board the *Bushire* against the owners of the *Bernina*. Those persons were killed by a collision between the two vessels, both of which were negligently navigated. One of the three persons (Toeg) was a passenger on the *Bushire*; one (Armstrong) was an engineer of the ship, though not to blame for the collision. The third (Owen) was her second officer, and was in charge of her, and was himself to blame for the collision. The questions for decision are, whether any, and if any, which of these actions can be maintained? and if any of them can, then whether the claims recoverable are to be awarded according to the principles which prevail at common law, or according to those which are adopted in the Court of Admiralty in cases of collision.

[The learned judge then decides that although actions under Lord Campbell's Act for causing death can now be brought in the Admiralty Division, yet the assessment of damages is to be governed by the rules prevailing in common-law actions.]

Having cleared the ground thus far, it is necessary to return to the statute and see under what circumstances an action upon it can be supported. The first matter to be considered is whether there has been

¹ Statement of case abridged. Arguments omitted. — Ed.

any such wrongful act, neglect, or default of the defendants as would, if death had not ensued, have entitled the three deceased persons respectively to have sued the defendants. Now, as regards one of them, namely, Owen, the second officer, who was himself to blame for the collision, it is clear that, if death had not ensued, he could not have maintained an action against the defendants. There was negligence on his part contributing to the collision, and no evidence to show that, notwithstanding his negligence, the defendants could, by taking reasonable care, have avoided the collision. There was what is called such contributory negligence on his part as to render an action by him unsustainable. It follows, therefore, that his representatives can recover nothing under Lord Campbell's Act for his widow and children, and their action cannot be maintained. The other two actions are not so easily disposed of. They raise two questions: (1) Whether the passenger Toeg, if alive, could have successfully sued the defendants; and if he could, then (2) whether there is any difference between the case of the passenger and that of the engineer Armstrong. The learned judge whose decision is under review felt himself bound by authority to decide both actions against the plaintiffs. The authorities which the learned judge followed are *Thorogood v. Bryan*, 8 C. B. 115, and *Armstrong v. Lancashire & Yorkshire Ry. Co.*, Law Rep. 10 Ex. 47; and the real question to be determined is whether they can be properly overruled or not. *Thorogood v. Bryan*, *supra*, was decided in 1849, and has been generally followed at Nisi Prius ever since when cases like it have arisen. But it is curious to see how reluctant the Courts have been to affirm its principle after argument, and how they have avoided doing so, preferring, where possible, to decide cases before them on other grounds. See, for example, *Rigby v. Hewitt*, 5 Ex. 240; *Greenland v. Chaplin*, 5 Ex. 243; *Waite v. North Eastern Ry. Co.*, E. B. & E. 719. I am not aware that the principle on which *Thorogood v. Bryan*, *supra*, was decided has ever been approved by any Court which has had to consider it. On the other hand, that case has been criticised and said to be contrary to principle by persons of the highest eminence, not only in this country, but also in Scotland and in America. And while it is true that *Thorogood v. Bryan*, *supra*, has never been overruled, it is also true that it has never been affirmed by any Court which could properly overrule it, and it cannot be yet said to have become indisputably settled law. I do not think, therefore, that it is too late for a Court of Appeal to reconsider it, or to overrule it if clearly contrary to well settled legal principles.

Thorogood v. Bryan, *supra*, was an action founded on Lord Campbell's Act. The facts were shortly as follows. The deceased was a passenger in an omnibus, and he had just got off out of it. He was knocked down and killed by another omnibus belonging to the defendants. There was negligence on the part of the drivers of both omnibuses, and it appears that there was also negligence on the part of the deceased himself. The jury found a verdict for the defendants, and there

does not seem to have been any reason why the Court should have disallowed the verdict if not driven to do so on technical grounds. In those days, however, a misdirection by the judge to the jury compelled the Court to grant a new trial, whether any injustice had been done or not; and accordingly the plaintiff moved for a new trial on the ground of misdirection, and it is with reference to this point that the decision of the Court is of importance. The learned judge who tried the case told the jury in effect to find for the defendant if they thought that the deceased was killed either by reason of his own want of care or by reason of want of care on the part of the driver of the omnibus out of which he was getting. The last direction was complained of, but was upheld by the Court. The *ratio decidendi* was that if the death of the deceased was not occasioned by his own negligence it was occasioned by the joint negligence of both drivers, and that, if so, the negligence of the driver of the omnibus off which the deceased was getting was the negligence of the deceased; and the reason for so holding was that the deceased had voluntarily placed himself under the care of the driver. Maule, J., puts it thus: "The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased." This theory of identification was quite new. No trace of it is to be found in any earlier decision, nor in any legal treatise, English or foreign, so far as I have been able to ascertain, nor has it ever been satisfactorily explained. It must be assumed, for the purpose of considering the grounds of the decision in question, that the passenger was not himself in fault. Assuming this to be so, then, if both drivers were negligent, and both caused the injury to the passenger, it is difficult to understand why both drivers or their masters should not be liable to him. The doctrine of identification laid down in *Thorogood v. Bryan*, *supra*, is, to me, quite unintelligible. It is, in truth, a fictitious extension of the principles of agency, but to say that the driver of a public conveyance is the agent of the passengers is to say that which is not true in fact. Such a doctrine, if made the basis of further reasoning, leads to results which are wholly untenable, *e. g.*, to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd, but which, of course, the Court never meant. All the Court meant to say was that for purposes of suing for negligence the passenger was in no better position than the man driving him. But why not? The driver of a public vehicle is not selected by the passenger otherwise than by being hailed by him as one of the public to take him up; and such selection, if selection it can be called, does not create the relation of principal and agent or master and servant between the passenger and the driver, the passenger knows nothing of the driver and has no control over him; nor is the driver in any proper sense employed by the passenger. The driver, if not his own master, is hired, paid, or employed by the owner of the vehicle he drives or by some other person who lets the vehicle to him. The orders

he obeys are his employer's orders. These orders, in the case of an omnibus, are to drive from such a place to such a place and take up and put down passengers; and in the case of a cab the orders are to drive where the passenger for the time being may desire to go, within the limits expressly or impliedly set by the employer. If the passenger actively interferes with the driver by giving him orders as to what he is to do, I can understand the meaning of the expression that the passenger identifies himself with the driver, but no such interference was suggested in *Thorogood v. Bryan*, *supra*. The principles of the law of negligence, and in particular of what is called contributory negligence, have been discussed on many occasions since that case was decided, and are much better understood now than they were thirty years ago. *Tuff v. Warman*, 5 C. B. (N. S.) 573, in the Exchequer Chamber, and *Radley v. London & North Western Ry. Co.*, 1 App. Cas. 754, in the House of Lords, show the true grounds on which a person himself guilty of negligence is unable to maintain an action against another for an injury occasioned by the combined negligence of both. If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant, the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by A. against B. for injury directly caused to A. by the want of care of A. and B. will not lie. As Pollock, C. B., pointed out in *Greenland v. Chaplin*, *supra*, the jury cannot take the consequences and divide them in proportion according to the negligence of the one or the other party. But if the plaintiff can show that although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action, as is shown not only by *Tuff v. Warman*, *supra*, and *Radley v. London & North Western Ry. Co.*, *supra*, but also by the well-known case of *Davies v. Mann*, 10 M. & W. 546, and other cases of that class. The cases which give rise to actions for negligence are primarily reducible to three classes, as follows:—

1. A. without fault of his own is injured by the negligence of B., then B. is liable to A.
2. A. by his own fault is injured by B. without fault on his part, then B. is not liable to A.
3. A. is injured by B. by the fault more or less of both combined; then the following further distinctions have to be made: (a.) if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.: *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244; *Dowell v. General Steam Navigation Co.*, 5 E. & B. 195; (b.) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injuring A., A. can sue B.: *Tuff v. Warman*, *supra*; *Radley v. London & North Western Ry. Co.*, *supra*; *Davies v. Mann*, *supra*; (c.) if there has been as much want of reasonable care on A.'s part as on B.'s, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A.

cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law. This follows from the two sets of decisions already referred to. But why in such a case the damages should not be apportioned, I do not profess to understand. However, as already stated, the law on this point is settled, and not open to judicial discussion. If now another person is introduced the same principles will be found applicable. Substitute in the foregoing cases B. and C. for B., and unless C. is A.'s agent or servant there will be no difference in the result, except that A. will have two persons instead of one liable to him. A. may sue B. and C. in one action, and recover damages against them both; or he may sue them separately and recover the whole damage sustained against the one he sues: *Clark v. Chambers*, 3 Q. B. D. 327, where all the previous authorities were carefully examined by the late L. C. J. Cockburn. This is no doubt hard on the defendant, who is alone sued, and this hardship seems to have influenced the Court in deciding *Thorogood v. Bryan*, *supra*. In that case the Court appears to have thought it hard on the defendant to make him pay all the damages due to the plaintiff, and that it was no hardship to the plaintiff to exonerate the defendant from liability, as the plaintiff had a clear remedy against the master of the omnibus in which he was a passenger. But it is difficult to see the justice of exonerating the defendant from all liability in respect of his own wrong and of throwing the whole liability on some one who was no more to blame than he. The injustice to the defendant, which the Court sought to avoid, is common to all cases in which a wrong is done by two people and one of them alone is made to pay for it. The rule which does not allow of contribution among wrong-doers is what produces hardship in these cases, but the hardship produced by that rule (if really applicable to such cases as these under discussion) does not justify the Court in exonerating one of the wrong-doers from all responsibility for his own misconduct or the misconduct of his servants. I can hardly believe that if the plaintiff in *Thorogood v. Bryan*, *supra*, had sued the proprietors of both omnibuses it would have been held that he had no right of action against one of them. Having given my reasons for my inability to concur in the doctrine laid down in *Thorogood v. Bryan*, *supra*, I proceed to consider how far that doctrine is supported by other authorities. [After commenting on various authorities]; *Thorogood v. Bryan*, *supra*, and *Armstrong v. Lancashire & Yorkshire Ry. Co.*, *supra*, affirm that, although if A. is injured by the combined negligence of B. and C., A. can sue B. and C., or either of them, he cannot sue C. if he, A., is under the care of B. or in his employ. From this general doctrine I am compelled most respectfully to dissent, but if B. is A.'s agent or servant the doctrine is good. In Scotland the decision in *Thorogood v. Bryan*, *supra*, was discussed and held to be unsatisfactory in the case of *Adams v. Glasgow &*

South Western Ry. Co., 3 Court Sess. Cas. 215. In America the subject was recently examined with great care by the Supreme Court of the United States in *Little v. Hackett*, 14 Am. Law Record, 577, 54 Am. Rep. 15, in which the English and American cases were reviewed, and the doctrine laid down in *Thorogood v. Bryan*, *supra*, was distinctly repudiated as contrary to sound principles. In this case the plaintiff was driving in a hackney carriage and was injured by a collision between it and a railway train on a level crossing. There was negligence on the part of the driver of the carriage and on the part of the railway company's servants, but it was held that the plaintiff was not precluded from maintaining an action against the railway company. In this country *Thorogood v. Bryan*, *supra*, was distinctly disapproved by Dr. Lushington in *The Milan*, Lush. 388; and even Lord Bramwell, who has gone further than any other judge in upholding the decision, has expressed disapproval of the grounds on which it was based. No text-writer has approved of it, and the comments in Smith's Leading Cases are adverse to it (vol. i. p. 266, 6th ed.). For the reasons above stated, I am of opinion that the doctrines laid down in *Thorogood v. Bryan*, *supra*, and *Armstrong v. Lancashire & Yorkshire Ry. Co.*, *supra*, are contrary to sound legal principles, and ought not to be regarded as law. Consequently, I am of opinion that the decision in Toeg's and Armstrong's case ought to be reversed.

Concurring opinions were delivered by LORD ESHER, M. R., and LOPES, L. J., the former elaborately reviewing the authorities.

Extract from opinion of LOPES, L. J.:—

If, again, the passenger is to be considered in the same position as the driver or owner, and their negligence is to be imputed to him, he would be liable to third parties; for instance, in case of a collision between two omnibuses, where the driver of one was entirely in fault, every passenger in the omnibus free from blame would have an action against every passenger in the other omnibus, because every such passenger would be identified with the driver, and is responsible for his negligence. Nor, again, in the case just put, could any passenger in the other omnibus bring an action against the owner of the omnibus in which he was carried, because the negligence of the driver is to be imputed to the passenger. If the negligence of the driver is to be attributed to the passenger for one purpose, it would be impossible to say he is not to be affected by it for others. Other cases might be put.

The more the decision in *Thorogood v. Bryan*, *supra*, is examined, the more anomalous and indefensible that decision appears.

The theory of the identification of the passengers with the negligent driver or owner is, in my opinion, a fallacy and a fiction, contrary to sound law and opposed to every principle of justice. A passenger in an omnibus whose injury is caused by the joint negligence of that omnibus and another, may, in my opinion, maintain an action, either against the owner of the omnibus in which he was carried or the other omnibus, or both. I am clearly of opinion *Thorogood v. Bryan*, *supra*, should be overruled.

Extract from opinion of LORD ESHER, M. R. : —

In Armstrong's action a point is suggested that he ought not to recover against the defendants, the owners of the Bernina, because he could not recover against the owners of the Bushire. He would, it is rightly said, in an action against the latter, be met by the doctrine of the accident being occasioned by the negligence of a fellow-servant. The suggestion would go too far. It would apply where passengers or goods are carried by railway, or in ship, under a notice limiting the liability of that railway company or shipowner. It would work manifest injustice by enabling a person to take advantage of a contract to which he was a stranger, and for the advantage of which he had given no consideration. The rule of law is, that a person injured by more than one wrong-doer may maintain an action for the whole damage done to him against any of them. There is no condition that he cannot do so unless he might, if he pleased, maintain an action against each of them. There is no disadvantage to the one sued, because there is no contribution between joint wrong-doers. The plaintiff Armstrong is therefore entitled to judgment for the whole of the damages he may be able to prove, according to the rule of damages laid down in Lord Campbell's Act. So in the case of the plaintiff Toeg. In the case of Owen, the deceased was personally negligent, so as that his negligence was partly directly a cause of the injury. He could not have recovered, neither can his administratrix.

Appeal allowed.

Affirmed in the House of Lords ; L. R. 13 App. Cases, 1.

NEWMAN v. PHILLIPSBURG HORSE CAR COMPANY.

1890. 52 *New Jersey Law Reports* (23 *Vroom*), 446.

THE plaintiff was a child two years of age ; she was in the custody of her sister, who was twenty-two ; the former, being left by herself for a few minutes, got upon the railroad track of the defendant, and was hurt by the car. The occurrence took place in a public street of the village of Phillipsburg. The carelessness of the defendant was manifest, as at the time of the accident there was no one in charge of the horse drawing the car, the driver being in the car collecting fares.

The Circuit judge submitted the three following propositions to this Court for its advisory opinion, viz. : —

First. Whether the negligence of the persons in charge of the plaintiff, an infant minor, should be imputed to the said plaintiff.

Second. Whether the conduct of the persons in charge of the plaintiff at the time of the injury complained of, was not so demonstrably negligent that the said Circuit Court should have nonsuited the plaintiff, or that the Court should have directed the jury to find for the defendant.

Third. Whether a new trial ought not to be granted, on the ground that the damages awarded are excessive.

Argued at February Term, 1890, before BEASLEY, C. J., and SCUDDER, DIXON and REED, JJ.

Messrs. Shipman & Son, for the plaintiff.

William H. Morrow, for the defendant.

The opinion of the Court was delivered by—

BEASLEY, C. J. There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law.

The problem is, whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American States this question has been answered by the Courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hartfield v. Roper & Newell*, reported in 21 Wend. 615. This case appears to have been one of first impression on this subject, and it is to be regarded, not only as the precursor, but as the parent of all the cases of the same strain that have since appeared.

The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to, for the facts were these: The plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the Court was, that as the child was permitted by its custodian to wander into a position of such danger it was without remedy for the hurts thus received, unless they were voluntarily inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was, that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that, consequently, by force of the well-known rule, under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian, and such infliction is justified in the case cited in this wise: "The infant," says the Court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons his act must be deemed that of the infant; his neglects the infant's neglects."

It will be observed that the entire content of this quotation is the statement of a single fact, and a deduction from it, the premise being, that the child must be in the care and charge of an adult, and the inference being that, for that reason, the neglects of the adult are the neglects of the infant. But surely this is, conspicuously, a *non sequitur*. How does the custody of the infant justify, or lead to, the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive, or forfeit, any of the

legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but, on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission. In this case in *Wendell* it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant; but this is a mere assumption without legal basis, for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burthen upon it. If a mother travelling with her child in her arms should agree with a railway company, that in case of an accident to such infant by reason of the joint negligence of herself and the company the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds; *first*, the contract would be *contra bonos mores*, and, *second*, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless, the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have resulted if such contract should have been made and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself, is deemed to be a pure interpolation into the law, for until the case under criticism it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: "The common principle is, that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage." 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances, that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper, all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child who, of course, can neither control or remove him, and the injustice, therefore, of making the latter responsible, in any measure whatever, for the torts of the former, would

seem to be quite evident. Such subjectivity would be hostile, in every respect, to the natural rights of the infant, and, consequently, cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, "You and I, by our common carelessness, have done this wrong, and, therefore, neither can look to the other for redress;" but when such wrong-doer says to the infant, "Your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone," a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrong-doer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being, that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice, nor hardship, in requiring all wrong-doers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance.

Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity, follow, that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinion, touching the subject just discussed, is in a state of direct antagonism, and it would, therefore, serve no usual purpose to refer to any of them. It is sufficient to say, that the leading text-writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tortfeasor by imputation. 1 Shearm. & R. Neg., § 75; Whart. Neg., § 311; 2 Wood Railw. L., p. 1284.

In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control.

Let the Circuit Court be advised to render judgment on the finding of the jury.

WELCH, J., IN BELLEFONTAINE & INDIANA RAILROAD CO.
v. SNYDER.

1868. 18 *Ohio State*, 408-409.

It is well settled that an adult person (capable of self-control) cannot recover for injuries occasioned by negligence, where he has himself also been guilty of negligence which contributed to the result. This rule of law is founded upon reason and considerations of justice and public policy, which it seems to us are wholly inapplicable to the case of an infant plaintiff. These reasons and considerations are: 1. The mutuality of the wrong, entitling each party alike, where both are injured, to his action against the other, if it entitles either; 2. The impolicy of allowing a party to recover for his own wrong; and, 3. The policy of making the personal interests of parties dependent upon their own prudence and care. All these are wanting in the case of an infant plaintiff. No action can be maintained against him for the negligence of his parent or custodian; and it is difficult to perceive what principle of public policy is to be subserved, or how it can be reconciled with justice to the infant, to make his personal rights dependent upon the good or bad conduct of others. It is the old doctrine of the father eating grapes, and the child's teeth being set on edge. The strong objection to it is its palpable injustice to the infant. Can it be true, and is such the law, that if only one party offends against an infant he has his action, but that if two offend against him, their faults neutralize each other, and he is without remedy? His right is to have an action against both.

GLASSEY v. HESTONVILLE, &c. RAILWAY CO.

1868. 57 *Pennsylvania State Reports*, 172.¹

ERROR to District Court of Philadelphia.

Action by William Glassey against Railway Company to recover for loss of his son's services, alleged to have been incurred by reason of his being hurt by collision in the street with the company's car. The son, four years of age, was alone in the street at the time of the injury. Defendants requested (among others) the following instruction:—

Knowingly to allow a child of less than four years of age to go at large in the public street, without a protector, is such negligence in his parents or guardians as will prevent the parent from recovering in an

¹ Statement of facts abridged. Citations of counsel omitted.—ED.

action brought by him for loss of service, by reason of injuries to such child.

The Court declined to give the instruction.

Verdict for plaintiff.

I. Hazlehurst, for plaintiffs in error.

C. Hart, for defendant in error.

STRONG, J. In *Smith v. O'Connor*, 12 Wright, 223, we said that when an action is brought by a father for an injury to his infant son, it may be that the father should be treated as a concurrent wrong-doer. The evidence may reveal him as such. His own fault may have contributed as much to the injury of the child, and consequently to the loss of service due him, as did the fault of the defendant. He owes to the child protection. It is his duty to shield it from danger, and his duty is the greater, the more helpless and indiscreet the child is. If by his own carelessness, his neglect of the duty of protection, he contributes to his own loss of the child's services, he may be said to be *in pari delicto* with a negligent defendant. We hold such to be the law. Though an infant of tender years may recover against a wrong-doer for an injury which was partly caused by his own imprudent act, an adult father cannot. And it makes no difference whether the injury of which he complains was to his absolute, or to his relative rights.

Protection then being a paternal duty, entire failure to extend it must be negligence. Generally what is and what is not negligence is a question for a jury. When the standard of duty is a shifting one, a jury must determine what it is as well as find whether it has been complied with. Not so when the law determines precisely what the extent of duty is, and there has been no performance at all. Now it would be strange were we not to hold that knowingly to permit a child less than four years old to run at large and without any protector, in the public streets of a large city, traversed constantly by railway cars and other vehicles, is not a breach of parental duty. A father has no right to expose his child to such dangers, and if he does, he fails in performance of his duty, and is guilty of negligence. The security of the community, and especially of children, demands the assertion of this doctrine. Nor is it novel. It has several times been avowed in the courts of New York and Massachusetts, and it is so reasonable that it commends itself to universal acceptance. The points submitted to the Court below should therefore have been affirmed. They were abstract, it is true, but they were applicable to this case if the jury found the facts as they might have found them.

Judgment reversed, and a venire de novo awarded.

WYMORE v. MAHASKA COUNTY.

1889. 78 Iowa, 396.¹

APPEAL from District Court, Poweshiek County, W. R. Lewis, Judge.

Plaintiff, as the administrator of the estate of Artemus Smith, deceased, seeks to recover damages resulting from the death of decedent, alleged to have been caused by negligence on the part of defendant.² After the evidence had been submitted, the jury were directed to return a verdict for the defendant, which they did. Judgment was rendered on the verdict, and plaintiff appeals.

Bolton & McCoy and *G. C. Morgan*, for appellant.

John F. Lacey and *Blanchard & Preston*, for appellee.

ROBINSON, J. In August, 1883, Henry Smith, with his family, consisting of his wife, a daughter, and plaintiff's intestate, then about two years of age, attempted to drive over a county bridge of defendant in a wagon drawn by two horses. The bridge fell while the team was on it, and the wagon and its occupants fell to the stream below. The fall resulted in the death of the mother and plaintiff's intestate. The plaintiff claims that at the time in question the bridge was out of repair, and in a dangerous condition, and that defendant is chargeable with knowledge of that fact; that it fell in consequence of that condition; and that decedent did not contribute to the injuries of which plaintiff complains.

[After deciding that the negligence of the parent is not imputable to the child, the opinion proceeds as follows.] In this case the child was taken into the wagon, and exposed to the accident which resulted in his death, without volition on his part. He certainly was free from fault. If his parents, by their negligence, contributed to his death, that does not seem to us to be a sufficient reason for denying his estate relief. Such negligence would prevent a recovery by the parents in their own right. *Smith v. Railway Co.*, 92 Pa. St. 450; *Huff v. Ames*, 16 Neb. 139; *Railway Co. v. Snyder*, 24 Ohio St. 670; 1 Shear. & R. Neg., sec. 71; *Railway Co. v. Schuster*, 113 Pa. St. 412; 6 Atl. Rep. 269; *Glassey v. Railway Co.*, 57 Pa. St. 172. See, also, *Albertson v. Railway Co.*, 48 Iowa, 294; Beach, Contrib. Neg., sec. 44; *Coal & Iron*


¹ Part of opinion omitted. — Ed.

² It would seem that the statutes of Iowa, as construed by the Court, provide for two actions against one who wrongfully causes the death of a minor. First. An action by the father, in which he may recover damages for the loss of the minor's services up to the date when the latter would have attained his majority. Second. An action by the administrator of the minor to recover damages belonging to the estate of the deceased, in which the recovery is had for the damages accruing after the minor would have attained his majority and up to the limit of his probable expectancy of life. See 2 McClain's Annotated Code of Iowa, Sections 3731 and 3761, with accompanying notes. — Ed.

Co. v. Brawley, 83 Ala. 371 ; 3 South. Rep. 556 ; *Railway Co. v. Wolf*, 59 Ind. 90. But it appears to us to be unjust and contrary to reason to hold that the irresponsible child should be responsible for the wrongful acts of his parents or others who may have him in charge. He is incapable by himself of committing any act of negligence, and cannot authorize another to commit one ; therefore it seems unreasonable to require him or his estate to suffer loss because of the neglect or unauthorized acts of his parents or others.

II. It is claimed that appellant ought not to recover, for the reason that it is not shown that the parents of the child were free from contributory negligence ; and, since they inherited his estate, the rule which would bar a negligent parent from recovering in such a case in his own right ought to apply. But plaintiff seeks to recover in the right of the child, and not for the parents. It may be that a recovery in this case will result in conferring an undeserved benefit upon the father, but that is a matter which we cannot investigate. If the facts are such that the child could have recovered, had his injuries not been fatal, his administrator may recover the full amount of damages which the estate of the child sustained.

Judgment reversed.



CHAPTER VI.

WHETHER NEGLIGENCE OF MAKER OR VENDOR OF CHATTEL
MAY MAKE HIM LIABLE TO PERSONS OTHER THAN THOSE
CONTRACTING WITH HIM.

WINTERBOTTOM v. WRIGHT.

1842. 10 *Meeson & Welsby*, 109.¹

CASE. The declaration stated, that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General; to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead: That the defendant, under and by virtue of the said contract, had agreed with the said Postmaster-General that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid: That Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also not, on any pretence whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of

¹ Part of argument omitted. — Ed.

the defendant he would not have done. The declaration then averred, that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on the 8th of August, 1840, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach, being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter, or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and, in consequence of injuries then received, had become lamed for life.

To this declaration the defendant pleaded several pleas, to two of which there were demurrers; but, as the Court gave no opinion as to their validity, it is not necessary to state them.

Peacock, who appeared in support of the demurrers, having argued against the sufficiency of the pleas, —

Byles, for the defendant, objected that the declaration was bad in substance. This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the Postmaster-General, and totally unconnected with them or with the plaintiff. Now it is a general rule, that wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be *ex contractu* or *ex delicto*, the party who made the contract alone can sue: *Tollit v. Sherstone*, 5 M. & W. 283. If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences would follow the adoption of such a principle. *Levy v. Langridge*, 4 M. & W. 337, will probably be referred to on the other side. But that case was expressly decided on the ground that the defendant, who sold the gun by which the plaintiff was injured, although he did not personally contract with the plaintiff, who was a minor, knew that it was bought to be used by him. Here there is no allegation that the defendant knew that the coach was to be driven by the plaintiff. There, moreover, fraud was alleged in the declaration, and found by the jury: and there, too, the cause of injury was a weapon of a dangerous nature, and the defendant was alleged to have had notice of the defect in its construction. Nothing of that sort appears upon this declaration.

Peacock, contra. This case is within the principle of the decision in *Levy v. Langridge*. Here the defendant entered into a contract with a

public officer to supply an article which, if imperfectly constructed, was necessarily dangerous, and which, from its nature and the use for which it was destined, was necessarily to be driven by a coachman. That is sufficient to bring the case within the rule established by *Levy v. Langridge*. In that case the contract made by the father of the plaintiff with the defendant was made on behalf of himself and his family generally, and there was nothing to show that the defendant was aware even of the existence of the particular son who was injured. Suppose a party made a contract with government for a supply of muskets, one of which, from its misconstruction, burst and injured a soldier: there it is clear that the use of the weapon by a soldier would have been contemplated, although not by the particular individual who received the injury, and could it be said, since the decision in *Levy v. Langridge*, that he could not maintain an action against the contractor? So, if a coachmaker, employed to put on the wheels of a carriage, did it so negligently that one of them flew off, and a child of the owner were thereby injured, the damage being the natural and immediate consequence of his negligence, he would surely be responsible. So, if a party entered into a contract to repair a church, a workhouse, or other public building, and did it so insufficiently that a person attending the former, or a pauper in the latter were injured by the falling of a stone, he could not maintain an action against any other person than the contractor; but against him he must surely have a remedy. It is like the case of a contractor who negligently leaves open a sewer, whereby a person passing along the street is injured. It is clear that no action could be maintained against the Postmaster-General: *Hall v. Smith*, 2 Bing. 156; *Humphreys v. Mears*, 1 Man. & R. 187; *Priestly v. Fowler*. But here the declaration alleges the accident to have happened through the defendant's negligence and want of care. The plaintiff had no opportunity of seeing that the carriage was sound and secure. [ALDERSON, B. The decision in *Levy v. Langridge* proceeds upon the ground of the knowledge and fraud of the defendant.] Here also there was fraud: the defendant represented the coach to be in a proper state for use, and whether he represented that which was false within his knowledge, or a fact as true which he did not know to be so, it was equally a fraud in point of law, for which he is responsible.

LORD ABINGER, C. B. I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. This is an action of the first impression, and it has been brought in spite of the precautions which were taken, in the judgment of this Court in the case of *Levy v. Langridge*, to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favor; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really

and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to everybody who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it; but with the exception of actions against inn-keepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is however contended, that this contract being made on the behalf of the public by the Postmaster-General, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence,—he may be remediless altogether. There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? That would, at all events, have defeated his claim altogether. By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.

ALDERSON, B. I am of the same opinion. The contract in this case was made with the Postmaster-General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no

reason why we should not go fifty. The only real argument in favor of the action is, that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract. Then it is urged that it falls within the principle of the case of *Levy v. Langridge*. But the principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There, a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of misrepresentation or fraud in this declaration? It shows nothing of the kind. Our judgment must therefore be for the defendant.

GURNEY, B., concurred.

ROLFE, B. The breach of the defendant's duty, stated in this declaration, is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of that word "duty." If a duty to the Postmaster-General be meant, that is true; but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none. This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*; it is, no doubt a hardship upon the plaintiff to be without a remedy, but, by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

Judgment for the defendant.

GEORGE AND WIFE v. SKIVINGTON.

1869. *Law Reports*, 5 *Exchequer*, 1.¹

DECLARATION, by Joseph George, and Emma his wife, that the defendant carried on the business of a chemist, and in the course of such business professed to sell a chemical compound made of ingredients known only to the defendant, and which he represented and professed

¹ Argument omitted. — ED.

to be fit and proper to be used for washing the hair, which could and might be so used without personal injury to the person using the same, and to have been carefully and skilfully and properly compounded by him, the defendant; and thereupon the plaintiff, Joseph George, bought of the defendant, and the defendant sold to him at a certain price, a bottle of the said compound, to be used by the plaintiff Emma, for washing her hair, as the defendant then knew, and on the terms that the same then was fit and proper to be used, and could be safely used, by her for the purpose aforesaid, without personal injury to her, and had been skilfully, carefully, and properly compounded by the defendant; yet the defendant had so unskilfully, negligently, and improperly conducted himself in and about making and selling the said compound, that by the mere unskilfulness, negligence, and improper conduct of the defendant, the said compound was not fit or proper to be used for washing the hair, nor could it be so used without personal injury to the person using the same; by which premises the plaintiff Emma, who used the said compound for washing her hair, pursuant to the terms upon which the same was sold by the defendant, was by using the same injured in health, &c.

Demurrer, and joinder.

H. W. Lord, in support of the demurrer.

Ingham, in support of the declaration, was not called on.

KELLY, C. B. I am of opinion that our judgment should be for the plaintiffs. The facts alleged by the declaration are shortly these, — that the plaintiff, Joseph George, purchased a chemical compound of the defendant as a hair-wash for the use of his wife, which was made up of ingredients known only to the defendant, and by him represented to be “fit and proper to be used for washing the hair;” and there is also an express statement that the defendant knew the purpose for which the article was bought. The declaration further alleges that the defendant “so unskilfully, negligently, and improperly conducted himself in and about selling and making the said compound” as to cause the damage complained of to the female plaintiff. Now, under these circumstances, the question is whether an action at the suit of the plaintiff, Emma George, her husband being joined for conformity, will lie. It is contended that it will not. There was no warranty, it is said, either express or implied, towards the purchaser himself. But it is not necessary to enter into that question, because the contract of sale is only alleged by way of inducement, the cause of action being, not upon that contract, but for an injury caused to the wife of the purchaser by reason of an article being sold to him for the use of his wife, and so sold to the defendant’s knowledge, turning out to be unfit for the purpose for which it was bought. There is, therefore, no question of warranty to be considered, but whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskilfulness and negligence in the manufacture of it whereby the person who used it

was injured. And I think that, quite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased. In *Langridge v. Levy*, 2 M. & W. 519, in Ex. Ch. 4 M. & W. 337, the defendant sold a gun to the plaintiff's father for the use, to his knowledge, of the plaintiff, and it was held that a duty arose towards the plaintiff that the gun should be safe; and here a similar duty arose towards the person who was known to the defendant to be about to use this wash; namely, a duty that the article sold should be reasonably fit for the purpose it was bought for and compounded with reasonable care. Under these circumstances, there being in the declaration a direct allegation of negligence and unskilfulness, our judgment ought to be for the plaintiffs. With regard to *Longmeid v. Holliday*, 7 Ex. 761, that case is entirely distinguishable, for there the jury found *bona fides* and no negligence on the part of the vendor. My Brother CHANNELL¹ wishes me to add that he concurs in this judgment.

PIGOTT, B. I am of the same opinion. The action is, in effect, against a tradesman for negligence and unskilfulness in his business. Such an action by the purchaser himself is clearly maintainable. Then, where the thing purchased is for the use not of the purchaser himself but, to the defendant's knowledge, of his wife, does the defendant's duty extend to her? I can see no reason why it should not. She cannot contract for herself alone, but that is no reason why the defendant's duty should stop short of her. The case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended. Suppose, for example, a chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child and does injury, it could not be contended that the chemist was liable. That, however, is widely different from this case; for, here, there is an express allegation that the defendant knew the purpose for which, and the person for whom, this compound was bought.

CLEASBY, B. I also think the declaration shows a good cause of action in the female plaintiff. No person can sue on a contract but the person with whom the contract is made; and this undoubted proposition was attempted to be taken advantage of in *Langridge v. Levy*, 2 M. & W. 519; in Ex. Ch. 4 M. & W. 337. The answer was that, admitting the proposition to be true, still a vendor who has been guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not one of the parties to the original contract, provided at least that his use of the article was contemplated by the vendor. It

¹ Channell, B., had left the court at the close of the arguments.

was therefore held in that case that the boy who used the defective gun, and for whose use the defendant knew it was destined, had a good cause of action. Substitute the word "negligence" for "fraud," and the analogy between *Langridge v. Levy* and this case is complete. The real question is whether the allegations in the declaration are sufficient to raise a duty towards the female plaintiff. Now it is alleged that the defendant himself manufactured this wash of ingredients known only to him, and that he held it out and professed it to be of a certain quality, and it was not of that quality; and that he knew it was purchased for the purpose of being used by the female plaintiff. Under the circumstances I think there was a duty imposed upon him to use due and ordinary care, and of the breach of that duty I am of opinion the female plaintiff, who was injured, can take advantage. The two things concur here; negligence and injury flowing therefrom. There was, therefore, a good cause of action in the person injured similar to that which was held to be good in *Langridge v. Levy*.

Judgment for the plaintiffs.

THOMAS AND WIFE v. WINCHESTER.

1852. 6 *New York* (2 *Selden*), 397.¹

ACTION against Winchester and Gilbert, for injuries sustained by Mrs. Thomas, from the effects of a quantity of extract of belladonna, administered to her by mistake as extract of dandelion.

The defendant, Winchester, was engaged at No. 108 John Street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and also in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts, whether manufactured by defendant or purchased by him, were labelled alike as "prepared by A. Gilbert." Gilbert was employed by defendant, and had previously been engaged in the same business on his own account at the same stand. Defendant purchased extract of belladonna from another manufacturer or dealer. The defendant put up this extract of belladonna in a jar labelled "Dandelion, prepared by A. Gilbert, No. 108 John Street, N. Y." The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell, and taste; but may on careful examination be distinguished the one from the other by those who are well acquainted with these articles. The former is a mild and harmless medicine. The latter is a deadly poison, which, if taken as a medicine in such quantity as might be safely administered of the former, would destroy life, or

¹ The statement of facts has been rewritten. The arguments are omitted. — ED.

seriously impair health. Defendant sold the jar, labelled as dandelion, but in fact containing belladonna, to Aspinwall, a druggist in New York; Aspinwall sold it to Foord, a druggist of Cazenovia, N. Y.; and Foord sold from the jar a portion of its contents to Samuel Thomas, one of the plaintiffs. All these sales purported to be, and were understood to be, sales of extract of dandelion. A physician had prescribed extract of dandelion for Mrs. Thomas, the female plaintiff. A small quantity of the medicine purchased by Mr. Thomas of Foord was administered to Mrs. Thomas under the belief that it was extract of dandelion. Mrs. Thomas was made seriously ill by the medicine, so that for a time her life was thought to be in danger.

After the plaintiffs had introduced testimony tending to prove the foregoing facts, the defendant moved for a nonsuit, on the following grounds (among others):—

1. That the action could not be sustained, as the defendant was the remote vendor of the article in question: and there was no connection, transaction, or privity between him and the plaintiffs, or either of them.

2. That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord.

The motion for a nonsuit was overruled.

The judge, among other things, charged the jury that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending, as and for dandelion, the extract taken by Mrs. Thomas, or that the plaintiff Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover.

The defendant Gilbert was acquitted by the jury under the direction of the Court, and a verdict was rendered against Winchester for eight hundred dollars.

A motion for a new trial having been denied at a general term, Winchester appealed.

Charles P. Kirkland, for appellant.

Nicholas Hill, Jr., for respondents.

RUGGLES, C. J. [After fully stating the case.] The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is, whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If, in labelling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A. build a wagon, and sell it to B., who sells it to C., and C. hires it to D., who in consequence of the gross negligence of A. in building the wagon is

overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else. And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of *Winterbottom v. Wright*, 10 Mees. & Welsb. 109, was decided. A. contracted with the postmaster-general to provide a coach to convey the mail bags along a certain line of road, and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C. could not maintain an action against A. for the injury thus sustained. The reason of the decision is best stated by Baron Rolfe. A.'s duty to keep the coach in good condition was a duty to the postmaster general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label.

Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labelled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter. 2 R. S. 662, § 19. A chemist who negligently sells laudanum in a phial labelled as paregoric, and thereby causes the death of a person to whom it is administered, is guilty of manslaughter. *Tessymond's Case*, 1 Lewin's Crown Cases, 169. "So highly does the law value human life, that it admits of no justification wherever life has been lost and the carelessness or negligence of one person has contributed to the death of another." *Regina v. Swindall*, 2 Car. & Kir. 232-233. And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. 2 Car. & Kir. 368, 371.

Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labelled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabelled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart who leaves them unattended in the street is liable for any damage which may result from his negligence. *Lynch v. Nurdin*, 1 Ad. & Ellis, N. S. 29; *Illidge v. Goodwin*, 5 Car. & Payne, 190. The owner of a loaded gun who puts it into the hands of a child by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. 5 Maule & Sel. 198. The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle, if the defendant had given the belladonna to Doctor Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label.

In *Longmeid v. Holliday*, 6 Law and Eq. Rep. 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was

represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant; and left the question of their negligence to the jury, who found on that point for the plaintiff. If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion; and to have been "prepared" by his agent Gilbert. The word "prepared" on the label, must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label, would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant cannot, in this case, set up as a defence, that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion; and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall, cannot be complained of by the defendant.

GARDINER, J., concurred in affirming the judgment, on the ground that selling the belladonna without a label indicating that it was a *poison*, was declared a misdemeanor by statute (2 R. S. 694, § 23); but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

GRIDLEY, J., was not present when the cause was decided. All the other members of the Court concurred in the opinion delivered by Ch. J. Ruggles.

Judgment affirmed.

BLOOD BALM COMPANY v. COOPER.

1889. 83 Georgia, 457.¹

ACTION by Cooper against Blood Balm Company in the City Court of Atlanta. Verdict for plaintiff. Defendants brought error.

Hillyer & Brother, for plaintiff in error.

Hall and Hammond, *contra*.

BLANDFORD, J. The main question in this case arises upon the refusal of the Court below to award a nonsuit, and the solution of this

¹ The statement of facts by the reporter is omitted. — ED.

question depends upon whether, where one prepares what is known as a proprietary or patent medicine, and puts it upon the market and recommends it to the world as useful for the cure of certain diseases, the bottle containing it having therewith a prescription made by the proprietor of the medicine, in which he states that it is to be taken in certain quantities, and such medicine, accompanied with this prescription, is sold by the proprietor to a druggist for the purpose of being resold to persons who might wish to use it, and the druggist sells the same to a person who uses it in the quantity thus prescribed, and it being shown that the same contains a certain article known as the iodide of potash in such quantity as proves harmful to the person thus using, the proprietor is liable. The plaintiff in error insists that there is no liability on the part of the proprietor, (1) because it was not sold by the proprietor to the person injured, but by a druggist who had purchased the same from the proprietor; and several cases are cited to sustain this position; (2) because the drug thus sold was not imminently hurtful or poisonous.

1. We are not aware of any decision of this Court upon this question, indeed there is none; and we have searched carefully not only the authorities cited by counsel in this case, but others, and we find no question like the one which arises in this record determined by any Court. In the case of *Thomas v. Winchester*, 6 N. Y. (2 Seld.) 397; 57 Am. Dec. 455; 1 Thompson, Neg. 224, referred to by counsel in this case, the question decided was, that a dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label. This comes nearer the present case than any we have been able to find, and it is relied upon by both parties as an authority; and in the notes thereto by Mr. Freeman in the *American Decisions*, the cases relied upon by counsel in this case are embraced and referred to, and to some extent considered. It is not denied by counsel in this case that the doctrine of the case cited (*Thomas v. Winchester*) is sound and correct law, but the present case differs from that case, and mainly in this: there the drug sold was a deadly poison, and the wrong consisted in putting a label upon the same which indicated that it was a harmless medicine; whereas in this case the medicine sold was not a deadly poison, and no label was put upon it which was calculated to deceive any one in this respect. But accompanying this medicine was a prescription of the proprietor stating the quantity to be taken, and the evidence tended to show that the quantity thus prescribed contained iodide of potash to such an extent as, when taken by the plaintiff, produced the injury and damage complained of. The liability of the plaintiff in error to the person injured arises, not by contract, but for a wrong committed by the proprietor in the prescription and direction as to the dose that should be taken.

We can see no difference whether the medicine was directly sold to

the defendant in error by the proprietor, or by an intermediate party to whom the proprietors had sold it in the first instance for the purpose of being sold again. It was put upon the market by the proprietor, not alone for the use of druggists to whom they might sell it, but to be used by the public in general who might need the same for the cure of certain diseases for which the proprietor set forth in his label the same was adapted. This was the same thing as if the proprietor himself had sold this medicine to the defendant in error, with his instructions and directions as to how the same should be taken. In all the cases cited by the plaintiff in error there is no case in which the proprietor prescribed the doses and quantities to be taken of the medicine sold by him. If this medicine contained the iodide of potassium in sufficient quantity to produce the injurious consequences complained of to the defendant in error, and if the same was administered to him, either by himself or any other person, as prescribed in the label accompanying the medicine, he could, in our judgment, recover for any injury he may have sustained on account of the poisonous effect thereof. It was a wrong on the part of the proprietor to extend to the public generally an invitation to take the medicine in quantities sufficient to injure and damage persons who might take it.

A medicine which is known to the public as being dangerous and poisonous if taken in large quantities, may be sold by the proprietor to druggists and others, and if any person, without more, should purchase and take the same so as to cause injury to himself, the proprietor would not be liable. But if the contents of a medicine are concealed from the public generally, and the medicine is prepared by one who knows its contents, and he sells the same, recommending it for certain diseases and prescribing the mode in which it shall be taken, and injury is thereby sustained by the person taking the same, the proprietor would be liable for the damage thus sustained. These proprietary or patent medicines are secret, or intended by the proprietors to be secret, as to their contents. They expect to derive a profit from such secrecy. They are therefore liable for all injuries sustained by any one who takes their medicine in such quantities as may be prescribed by them. There is no way for a person who uses the medicine to ascertain what its contents are, ordinarily, and in this case the contents were only ascertained after an analysis made by a chemist, — which would be very inconvenient and expensive to the public; nor would it be the duty of a person using the medicine to ascertain what poisonous drugs it may contain. He has a right to rely upon the statement and recommendation of the proprietor, printed and published to the world; and if thus relying, he takes the medicine and is injured on account of some concealed drug of which he is unaware, the proprietor is not free from fault, and is liable for the injury thereby sustained. It appears from the analysis made by the chemist in this case that this medicine contained 25 grains of the iodide of potash to two tablespoonfuls of the medicine. The testimony of the plaintiff, by

witnesses learned in the profession of medicine, was that iodide of potash in this quantity would produce the effects upon a person using it shown by the condition of the defendant in error. The prescription accompanying the bottle directed the taking of one to two tablespoonfuls of the medicine, and this was done by the defendant in error, and he was thereby greatly injured and damaged.

This is not like the case of a dangerous machine or a gun sold to a person and by him given or sold to another, as in some of the cases referred to. Mr. Freeman, in his notes to the case above referred to (*Thomas v. Winchester*), alludes to all those cases; and Mr. Thompson, in his work on Negligence, refers to the same cases, and they are there fully discussed.

[Remainder of opinion omitted].

Judgment affirmed.

SCHUBERT v. J. R. CLARK COMPANY.

1892. *Supreme Court of Minnesota*, 51 *North Western Reporter*, 1103.

APPEAL from District Court, Hennepin county, Hooker, Judge.

Action by Edward J. Schubert against the J. R. Clark Company to recover for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Welch, Botkin & Welch, for appellant.

F. B. Larabee, for respondent.

DICKINSON, J. The sufficiency of the complaint as showing a right to recover against the defendant is here for decision. The facts of the case, as shown by the complaint, may be thus stated: The plaintiff, a house-painter, was in the employ of one Phelps. He was engaged in the work of painting the interior of a certain building. His employer, Phelps, as a purchaser, ordered from a retail merchant a new 10-foot step-ladder, directing that it be delivered to the plaintiff at the place where he was at work. The merchant, not having such a ladder in his stock of goods, ordered the defendant corporation to deliver such a step-ladder to the plaintiff for his use. The defendant delivered a ladder to the plaintiff pursuant to that order. This we construe to have been a purchase by the merchant from the defendant. The defendant was a manufacturer of such goods, and the ladder so delivered had "theretofore" been manufactured by it, "to be sold for the purpose of being used." It was made of poor, cross-grained, and decayed lumber, and "was so insufficient in strength as to be dangerous to the life and limb of this plaintiff and whoever might use the same." It is alleged that the defendant knew, or ought to have known, such defects and insufficiency. Neither the plaintiff nor his employer nor the merchant from whom the latter ordered the ladder knew such defects, and it was so varnished, oiled, and painted that they could not discover them. The

plaintiff, supposing the ladder to have been made of good material, and to be of sufficient strength, proceeded to use it in the performance of his work, and while he was standing on it, seven feet above the floor, it broke without his fault, causing him to fall, and he was thereby injured. The complaint is defective in not stating, but leaving it only to be inferred, that the ladder broke by reason of the alleged defects; but this fault is not relied upon by the appellant, and we pass it over to consider the real merits of the case.

Let us consider more particularly wherein the defendant is shown to have been guilty of a wrong towards the plaintiff, of which the latter may complain, or what legal duty the defendant owed to the plaintiff, or generally to any one who, in the ordinary course of events, might procure the ladder for use. There was no contract relation between the plaintiff and the defendant, and hence no contract obligation for the violation of which the plaintiff can recover. Neither the plaintiff nor even his employer was a party to the contract of sale pursuant to which the ladder was delivered to the plaintiff. He did not stand in any relation of privity with the contracting parties, — the retail merchant, who purchased, and the defendant, who sold the ladder. The contract was not entered into nor executed for his benefit; and, if there was any breach of the contract, the plaintiff has no right of action merely for that. If the defendant is liable, it must be upon the ground that the circumstances under which the ladder was manufactured and delivered were such that the neglect to disclose the existence of the defect was a wrong, — a neglect of a duty recognized by law independent of contract. Accepting the allegations of the complaint as true, we assume that by reason of the defects complained of the ladder was dangerous to the life or limb of a person using it in the way in which such articles are ordinarily used. If there was any legal duty resting on the defendant for the breach of which the plaintiff can complain it will be more apparent if the alleged negligence and consequent injury are brought into close proximity. Hence we will for the present assume that when the ladder was delivered directly to the plaintiff for his use by the defendant, the latter knew the concealed defects, and had reason to apprehend that the use of it by the plaintiff, or by any one, would be attended by serious personal injury. It would constitute an actionable wrong for the defendant, to thus knowingly and unnecessarily do what it had reason to suppose would result in injury to the plaintiff without the intervention of any fault or neglect on his part or on the part of any other person. If the defendant knowingly delivered such an article for the plaintiff's use, it was its duty to warn him of the danger by disclosing the hidden defects; and neglect of that duty would constitute actionable negligence. Every one may be supposed to understand that such articles are manufactured, sold, disposed of, with a view to their being used. They are valuable and salable only because of their supposed fitness for use. One who procures such an article, either from a manufacturer or from a retail dealer,

would ordinarily assume without inquiry, and without any express warranty, that it is what it appears to be, — a thing intended for actual use; and that it has not been so negligently manufactured that by reason of concealed defects its use would be attended with danger of serious injury. And this must be supposed to be understood by the person who disposes of it; and if, knowing the existence of such defects, he neglects to disclose them, so that the other party may be warned of his danger, such neglect amounts to bad faith. Under such circumstances, silence would partake of the nature of an assurance that the thing had not any such known but concealed dangerous defects. Silence would have the effect and the quality of deceit.

The following cases may be cited as instances in which, although there were no contract relations between the parties, a legal duty towards the person injured has been recognized: *Thomas v. Winchester*, 6 N. Y. 397, was an action by a person whose physician had prescribed for her use as a remedy the extract of dandelion, which is a harmless drug. A druggist furnished her what was supposed to be extract of dandelion, taking it from a jar so labelled by the defendant, the manufacturer. With that label on the jar, the defendant had sold it to a dealer in drugs, from whom the druggist who dispensed it for the plaintiff's use had purchased it. In fact the jar contained extract of belladonna, a poison. The defendant was held liable for injury suffered by the plaintiff from taking the mislabelled poison. A similar case was that of *Norton v. Sewall*, 106 Mass. 143, where the defendant, an apothecary, negligently sold a deadly poison, laudanum, in place of a harmless medicine, rhubarb, which had been called for. The purchaser procured it to administer to his servant. The servant having died from the effect of the poison, his administrator was allowed to maintain an action for the negligence. In *Elkins v. McKean*, 79 Pa. St. 493, 502, it was considered that, if refiners and vendors of petroleum put on the market for sale for illuminating purposes an oil which they know to be below the legal fire test, they would be liable for a death caused by the explosion of a lamp, even though the oil had been purchased from an intermediate dealer. In *Wellington v. Oil Co.*, 104 Mass. 64, the principle of general duty and liability, independent of contract relations, was carried very far. The defendant, knowing naphtha to be an explosive fluid, dangerous for use for illuminating purposes, sold it to a retail dealer, knowing that the latter intended to sell it for such use. The plaintiff purchased from the retail dealer for that purpose, both he and the seller being ignorant of the dangerous nature of the substance. The plaintiff was held entitled to recover for injuries suffered from its use. The case of *Bishop v. Weber*, 139 Mass. 411, 1 N. E. Rep. 154, was this: The plaintiff attended a ball, for which he had purchased a ticket. The defendant, a caterer, had been employed to provide refreshments for those who should attend the ball. The plaintiff partook of the food furnished by the defendant, which was alleged to have been unwholesome and

poisonous. The defendant was held liable. In *Heaven v. Pender*, 11 Q. B. Div. 503, Brett, M. R., laid down in general terms the rule of duty and liability, even in the absence of a contract relation between the parties, sufficiently broadly to cover this case, and to hold the defendant to responsibility if the case were as we are assuming it to have been. While the other justices declined to adopt the general test of liability which was stated by the Master of the Rolls, they declared that they did not intend to express a doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who, without due warning, supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act. In *George v. Skivington*, L. R. 5 Exch. Cas. 1, a husband purchased from the defendant a chemical compound as a hair-wash for his wife's use. It proved to be of a harmful nature, and the wife's health was injured. She was allowed to maintain an action for the injury. In this connection should also be cited, as recognizing a duty independent of contract relations, *Moon v. Railroad Co.* (Minn.), 48 N. W. Rep. 679, 680. See also, Cooley, Torts, 560 (2d Ed.).

There is another class of cases in which the element of a contract relation was involved, but in which the conduct of the defendant in concealing or not disclosing a danger which he knew or had reason to apprehend, was treated as being in the nature of a fraud or deceit. See *Marsh v. Webber*, 13 Minn. 109, 114 (Gil. 99); *Jeffrey v. Bigelow*, 13 Wend. 518, which were cases of the sale of domestic animals, the vendor knowing that they were infected with a contagious disease. *French v. Vining*, 102 Mass. 132, was a sale of hay to be used by the purchaser for feeding her cow, the seller (defendant) knowing, but not disclosing the fact, that white lead had been spilled upon the hay from which that sold had been taken. The defendant was held liable for the death of the cow, although he had attempted to remove all of the hay that had been injuriously affected, and supposed that he had done so. The opinion in this case gives prominence to the feature of the wrong in not disclosing the fact. Of such cases it may be observed that the conduct of the defendant could not be deemed thus wrongful, unless it involved the breach of a legal duty. The conclusion must rest upon, and presupposes, the existence of a duty, recognized as such by the law, to disclose the concealed defect, concerning which the other party is presumably ignorant. If there is such a duty, its neglect, followed by injury proximately resulting, constitutes actionable wrong.

We have heretofore assumed that the defendant knew the defects when he delivered the ladder to the plaintiff. But our statement of the case shows that such was not the fact, or at least it does not appear from the complaint that it was so. It seems from the complaint

that at some time prior to the ordering and delivery of the article the defendant in the course of its business of manufacturing such goods had negligently constructed this ladder for sale, but not (as we will assume in favor of the defendant) with any specific intention or anticipations as to who might purchase or use it; but only intending that it should go into its stock of goods of that kind, to be sold in the usual course of business, and thus at length come to the hands of some one who would purchase it for actual use. The defendant is to be deemed to have known the fact alleged, that the dangerous defects were concealed by the application of oil, paint, and varnish, although we do not understand that this was applied for the purpose of concealing such defects. It would seem that after that was done the defendant could not have distinguished this ladder from any other of its manufactured goods of a like kind. If, then, the defendant did not know, and could not have discovered, at the time of delivering this ladder to the plaintiff, that it was defective, there could be no wrong in not then disclosing the existence of defects in this particular article, which were neither known nor discoverable; and the question of the defendant's liability reaches back to the time of manufacturing and putting into its stock of goods for sale an article then known to be dangerously defective, the defects being concealed, and not likely to be discovered, either by any intermediate purchaser standing between the defendant and the person who might procure the ladder for use, or by the latter person. We shall assume, then, that there was no wrongful conduct when the ladder was delivered, but only, if at all, when it was manufactured, and put in the defendant's general stock for sale. In this view of the case, the wrongful conduct of the defendant and the injury resulting therefrom would be somewhat more widely separated in time and in the order of events than in the case as we have heretofore assumed it to have been; but it would not change their real relation as cause and effect, nor so qualify that relation that the law would regard the injury as being so remote from the wrong that for that reason responsibility should cease. When the defendant manufactured and put the dangerously faulty article in its stock for sale, it is to be deemed to have anticipated that, in the ordinary course of events, it would come to the hands of a purchaser, either directly from the defendant or from some intermediate dealer, for actual use, and with the consequences which actually were suffered. It must have been deemed probable that any intervening dealer would not discover the defect, and that nothing would be likely to occur to avert the danger to which the person who might use the ladder would be subjected by the defendant's negligence. Hence it would be difficult to distinguish such a case in principle from one where the transaction is directly between the wrong-doer, then knowing the danger, and the party who is injured. If any distinction is to be made it must rest upon grounds of expediency, the arbitrary fixing of a limit to the liability of the wrong-doer. But we consider that in principle the defendant should be held to re-

sponsibility for an injury resulting proximately, and without any intervening wrongful agency, from its confessedly negligent act, which was such as to expose another to great bodily harm; and that no reason of policy forbids this. The authorities which have been cited we deem to be sufficient to justify this conclusion, although it is to be admitted that there are others tending to an opposite result.

Order affirmed.

CURTIN v. SOMERSET.

1891. 140 *Pennsylvania State Reports*, 70.¹

E. Cooper Shapley, for appellant.

Joseph S. Goodbread, for appellee.

PAXSON, C. J. The defendant, Philip H. Somerset, entered into a contract with the Sea Isle City Hotel Company, for the erection of a hotel building, at Sea Isle City, according to certain plans and specifications. The building was completed, and accepted by the hotel company in the presence of their architect and the chairman of the building committee. Subsequently, at an entertainment given at the hotel by the proprietor or lessee, a crowd of persons, some twenty or more, having collected on the porch, a girder, which in part supported it, gave way, the porch fell, and by reason thereof the plaintiff [a guest at the hotel] was injured. He brought this suit in the Court below against the contractor, to recover damages for the injury he thus sustained, with the result of a verdict in his favor for \$4,000.

Upon the trial, the defendant asked the Court below to instruct the jury that "if Somerset, the defendant, was the contractor for the erection of the hotel in question, for the Sea Isle City Hotel Company, the owner, and after completion delivered possession of it to the said Sea Isle City Hotel Company on June 30, 1888, which company accepted it, and if the accident in question happened after June 30, 1888, and while said owner or his lessee was in possession, then the plaintiff is not entitled to recover against the defendant." See first assignment. This point was refused, and it fairly presents the important question in the case.

The contention of the plaintiff is that the accident was caused by the defective construction of the porch; that it was not according to the plans and specifications called for by the contract; that timbers inferior in size and quality to those called for by the plans were used; that these defects were not observable after the building was completed, and, in point of fact, were unknown to the company when it accepted the building from the contractor.

¹ The statement of facts by the reporter is omitted; also the arguments of counsel.—ED.

We must assume these allegations as substantially found by the jury, and the question arises, what is the responsibility of the contractor under such circumstances? That he would be responsible to the company for any loss sustained by it in consequence of his failure to erect the building in conformity to the plans and specifications, may be conceded. There was a contractual relation between them, and for breach of a contract, not known to and approved by the company, he would be liable. Is he also liable for an injury to a third person not a party to the contract, sustained by reason of defective construction? It is very clear that he was not responsible by force of any contractual relation, for, as before observed, there was no contract between these parties, and hence there could have been no breach. If liable at all, it can only be for a violation of some duty. It may be stated, as a general proposition, that a man is not responsible for a breach of duty where he owes no duty. What duty did the defendant owe to the plaintiff? The latter was not upon the porch by the invitation of the defendant. The proprietor of the hotel, or whoever invited or procured the presence of the plaintiff there, may be said to have owed him a duty,—the duty of ascertaining that the porch was of sufficient strength to safely hold the guests whom he had invited. The plaintiff contended, however, that as the hotel company was not responsible, the contractor must necessarily be so. This, however, is moving in a circle. It by no means follows that because A. is not responsible for an accident B. or some other person must be.

Authorities are not abundant upon this point, for the reason that it is comparatively new. I do not know of any direct ruling upon it in this State. The true rule, which we think applicable to it, may be found in Wharton on Negligence, 2d ed. § 438. It is as follows:—

“There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. . . . Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and, after he has finished his work and it has been accepted by the city, a traveller is hurt when passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveller in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveller's hurt and the contractor's negligence. The traveller reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveller. The traveller, no doubt, reposed confidence in the city that it would have its bridges and highways in good order; but between the contractor and the traveller intervened the city, an independent, responsible agent, breaking the causal connection.”

In § 438, the same learned author refers to the case of a contract

with the postmaster-general to furnish certain roadworthy carriages ; and after the delivery of the carriages the plaintiff is injured in using one of them, by reason of the carriage having been defectively built. " No doubt," says Mr. Wharton, " had the carriage been built for the plaintiff, he could have recovered from the contractor. But there is no confidence exchanged between him and the contractor ; and between them, breaking the causal connection, is the postmaster-general, acting independently, forming a distinct legal centre of responsibilities and duties." This rule is distinctly recognized in *Winterbottom v. Wright*, 10 M. & W. 115. [Here the Court stated that case.]

Francis v. Cockrell, L. R. 5 Q. B. 501 ; *Heaven v. Pender*, 11 Q. B. 503 ; *Collis v. Selden*, L. R. 3 C. P. 495 ; and other English cases, recognize the doctrine that in such instances there is no duty owing from the contractor to the public. As was said by Martin, B., in *Francis v. Cockrell*, *supra* : " The law of England looks at proximate liabilities as far as possible, and endeavors to confine liabilities to the persons immediately concerned." In *Losee v. Clute*, 51 N. Y. 494, it was held that the manufacturer and vendor of a steam-boiler is only liable to the purchaser for defective materials, or for any want of care and skill in its construction ; and if, after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, because of such injury, against the manufacturer.

We do not find that any of the cases cited on behalf of the plaintiff conflict with the above views. In *Godley v. Hagerty*, 20 Pa. 387, the builder was the owner, and he was properly held responsible for an inherent weakness in the building by which an accident occurred. In *Carson v. Godley*, 26 Pa. 111, the warehouse was erected under the personal superintendence of the owner, and having leased it to the government, he was held liable to a person whose goods were destroyed by the fall of the building, in consequence of its insufficiency for the purpose for which it was erected and leased. In *Thomas v. Winchester*, 6 N. Y. 397, the Court held a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, to be liable to all persons who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison, to have it properly labelled to avoid accidents. Just here the analogy between this case and the one in hand ceases. The defendant owed no duty to the public, as before stated ; his duty was to his employer.

We need not pursue the subject further. We regard the weight of authority as with the views above indicated. Moreover, they are sustained by the better reason. The consequences of holding the opposite doctrine would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work ; a manufacturer who

constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned. We are of opinion that the defendant's first point should have been affirmed. So, also, his second point, which asked for a binding instruction in his favor.

[Remainder of opinion omitted.]

Judgment reversed.

HEAVEN v. PENDER.

1883. *Law Reports*, 11 *Queen's Bench Division*, 503.¹

ACTION to recover damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. The County Court judge gave judgment for the plaintiff. The Queen's Bench Division, on appeal, ordered judgment for defendant. The plaintiff appealed to the Court of Appeal.

A. Charles, Q. C., and *C. C. Scott*, for plaintiff.

Bompas, Q. C., and *H. Dickens*, for defendant.

BRETT, M. R. In this case the plaintiff was a workman in the employ of Gray, a ship-painter. Gray entered into a contract with a ship-owner whose ship was in the defendant's dock to paint the outside of his ship. The defendant, the dock-owner, supplied, under a contract with the ship-owner, an ordinary stage to be slung in the ordinary way outside the ship for the purpose of painting her. It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use, that it would not be used by the ship-owner, but that it would be used by such a person as the plaintiff, a working ship-painter. The ropes by which the stage was slung, and which were supplied as a part of the instrument by the defendant, had been scorched and were unfit for use, and were supplied without a reasonably careful attention to their condition. When the plaintiff began to use the stage the ropes broke, the stage fell, and the plaintiff was injured. The Divisional Court held that the plaintiff could not recover against the defendant. The plaintiff appealed. The action is in form and substance an action for negligence. That the stage was, through want of attention of the defendant's servants, supplied in a state unsafe for use is not denied. But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care

¹ Arguments omitted. — Ed.

in the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill toward a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The question in this case is whether the defendant owed such a duty to the plaintiff.

If a person contracts with another to use ordinary care or skill toward him or his property, the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty toward each other. So two ships navigating the sea. So a railway company which has contracted with one person to carry another has no contract with the person carried, but has a duty toward that person. So the owner or occupier of a house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty toward him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract, by the facts with regard to which the contract is made and to which it applies an exactly similar but a contract duty. We have not in this case to consider the circumstances in which an implied contract may arise to use ordinary care and skill to avoid danger to the safety of person or property. We have not in this case to consider the question of a fraudulent misrepresentation, express or implied, which is a well-recognized head of law. The questions which we have to solve in this case are: What is the proper definition of the relation between two persons other than the relation established by contract, or fraud, which imposes on one of them a duty toward the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property; and whether the present case falls within such definition. When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill under such circumstances there would be such danger. And every one ought, by the universally recognized rules of right and wrong, to think so much with regard to the safety of others who may be jeopardized by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neg-

lects to use ordinary care and skill, and injury ensue, the law, which takes cognizance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury. In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage, the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property other phraseology has been used, which it is necessary to consider. If a man opens his shop or warehouse to customers it is said that he invites them to enter, and that this invitation raises the relation between them which imposes on the inviter the duty of using reasonable care so to keep his house or warehouse that it may not endanger the person or property of the person invited. This is in a sense an accurate phrase, and as applied to the circumstances a sufficiently accurate phrase. Yet it is not accurate if the word "invitation" be used in its ordinary sense. By opening a shop you do not really invite, you do not ask A. B. to come in to buy; you intimate to him that if it pleases him to come in he will find things which you are willing to sell. So in the case of shop, warehouse, road, or premises, the phrase has been used that if you permit a person to enter them you impose on yourself a duty not to lay a trap for him. This, again, is in a sense a true statement of the duty arising from the relation constituted by the permission to enter. It is not a statement of what causes the relation which raises the duty. What causes the relation is the permission to enter and the entry. But it is not a strictly accurate statement of the duty. To lay a trap means in ordinary language to do something with an intention. Yet it is clear that the duty extends to a danger the result of negligence without intention. And with regard to both these phrases, though each covers the circumstances to which it is particularly applied, yet it does not cover the other set of circumstances from which an exactly similar legal liability is inferred. It follows, as it seems to me, that there must be some larger proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premises there must be a more remote and larger premise which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage. The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Without displacing the other propositions to which allusion has been made

as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognized cases of liability. It is the only proposition which covers them all. It may, therefore, safely be affirmed to be a true proposition, unless some obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case. Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens, a legal liability arises to be enforced by an action for negligence. This includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not to be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would, according to the rule above stated, imply the duty.

Examining the rule which has been above enunciated with the cases which have been decided with regard to goods supplied for the purpose of being used by persons with whom there is no contract, the first case to be considered is inevitably *Langridge v. Levy*, 2 M. & W. 519; 4 id. 337. It is not an easy case to act upon. It is not, it cannot be, ac-

curately reported; the declaration is set out; the evidence is assumed to be reported; the questions left to the jury are stated. And then it is said that a motion was made to enter a nonsuit in pursuance of leave reserved on particular grounds. These grounds do not raise the question of fraud at all, but only the question of remoteness. And although the question of fraud seems in a sense to have been left to the jury, yet no question was, according to the report, left to them as to whether the plaintiff acted on the faith of the fraudulent misrepresentation, which is, nevertheless, a necessary question in a case of fraudulent misrepresentation. The report of the argument makes the object of the argument depend entirely upon an assumed motion to arrest the judgment, which raises always a discussion depending entirely on the form of the declaration, and the effect on it of a verdict, in respect of which it is assumed that all questions were left to the jury. If this was the point taken the report of the evidence and of the questions left to the jury is idle! The case was decided on the ground of a fraudulent misrepresentation as stated in the declaration. It is inferred that the defendant intended the representation to be communicated to the son. Why he should have such an intention in fact it seems difficult to understand. His immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether, after the sale and payment, the gun would be used or not by the son. I cannot hesitate to say that, in my opinion, the case is a wholly unsatisfactory case to act on as an authority. But taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son, and acted upon by him, such a decision upon such a ground in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud. It seems to be a case which is within the proposition enunciated in this judgment, and in which the action might have been supported without proof of actual fraud. And this seems to be the meaning of Cleasby, B., in the observations he made on *Langridge v. Levy*, *supra*, in the case of *George v. Skivington*, L. R. 5 Ex. 1, 5. In that case the proposition laid down in that judgment is clearly adopted. The ground of the decision is that the article was, to the knowledge of the defendant, supplied for the use of the wife and for her immediate use. And certainly, if he or any one in his position had thought at all, it must have been obvious that a want of ordinary care or skill in preparing the prescription sold would endanger the personal safety of the wife.

In *Corby v. Hill*, 4 C. B. (N. S.) 556, it is stated by the Lord Chief Justice that an allurement was held out to the plaintiff. And Willes, J., stated that the defendant had no right to set a trap for the plaintiff. But in the form of declaration suggested by Willes, J., on p. 567, there is no mention of allurement, or invitation or trap. The facts suggested in that form are, "that the plaintiff had license to go on the road, that he was in consequence accustomed and likely to pass along it, that the defendant knew of that custom and probability, that the defendant neg-

ligerly placed slates in such a manner as to be likely to prove dangerous to persons driving along the road, that the plaintiff drove along the road, being by reason of the license lawfully on the road, and that he was injured by the obstruction." It is impossible to state a case more exactly within the proposition laid down in this judgment. In *Smith v. London & St. Katharine Docks Co.*, L. R. 3 C. P. 326, the phrase is again used of invitation to the plaintiff by the defendants. Again, let it be observed that there is no objection to the phrase as applied to the case. But the real value of the phrase may not improperly be said to be that invitation imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and therefore carries with it the relation between the parties which establishes the duty. In *Indermaur v. Dames*, L. R. 1 C. P. 274; L. R. 2 C. P. 311, reliance is again placed upon a supposed invitation of the plaintiff by the defendant. But, again, it is hardly possible to state facts which bring a case more completely within the definition of the present judgment. In *Winterbottom v. Wright*, 10 M. & W. 109, it was held that there was no duty cast upon the defendant with regard to the plaintiff. The case was decided on what was equivalent to a general demurrer to the declaration. And the declaration does not seem to show that the defendant, if he had thought about it, must have known, or ought to have known, that the coach would be necessarily or probably driven by the plaintiff, or by any class of which he could be said to be one, or that it would be so driven within any time which would make it probable that the defect would not be observed. The declaration relied too much on contracts entered into with other persons than the plaintiff. The facts alleged did not bring the case within the proposition herein enunciated. It was an attempt to establish a duty toward all the world. The case was decided on the ground of remoteness. And it is as to too great a remoteness that the observation of Lord Abinger is pointed, when he says that the doctrine of *Langridge v. Levy*, *supra*, is not to be extended. In *Francis v. Cockrell*, L. R. 5 Q. B. 501, the decision is put by some of the judges on an implied contract between the plaintiff and the defendant. But Cleasby, B. (p. 515), puts it upon the duty raised by the knowledge of the defendant that the stand was to be used immediately by persons of whom the plaintiff was one. In other words, he acts upon the rule above laid down. In *Collis v. Selden*, L. R. 3 C. P. 495, it was held that the declaration disclosed no duty. And obviously, the declaration was too uncertain. There is nothing to show that the defendant knew more of the probability of the plaintiff rather than any other of the public being near the chandelier. There is nothing to show that the plaintiff was more likely to be in the public-house than any other member of the public. There is nothing to show how soon after the hanging of the chandelier any one might be expected or permitted to enter the room in which it was. The facts stated do not bring it within the rule. There is an American case: *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455, cited in Mr. Horace

Smith's Treatise on the Law of Negligence, p. 88, note (t), which goes a very long way. I doubt whether it does not go too far. In *Longmeid v. Holliday*, 6 Ex. 761, a lamp was sold to the plaintiff to be used by the wife. The jury were not satisfied that the defendant knew of the defect in the lamp. If he did, there was fraud; if he did not, there seems to have been no evidence of negligence. If there was fraud, the case was more than within the rule. If there was no fraud, the case was not brought by other circumstances within the rule. In *Gautret v. Egerton*, L. R. 2 C. P. 374, the declaration was held by Willes, J., to be bad on demurrer, because it did not show that the defendant had any reason to suppose that persons going to the docks would not have ample means of seeing the holes and cuttings relied on. He does not say there must be fraud in order to support the action. He says there must be something like fraud. He says: "Every man is bound not wilfully to deceive others." And then, in the alternative, he says: "or to do any act which may place them in danger." There seems to be no case in conflict with the rule above deduced from well admitted cases. I am, therefore, of opinion that it is a good, safe, and just rule.

I cannot conceive that if the facts were proved which would make out the proposition I have enunciated, the law can be that there would be no liability. Unless that be true, the proposition must be true. If it be the rule the present case is clearly within it. This case is also, I agree, within that which seems to me to be a minor proposition, namely, the proposition which has been often acted upon, that there was in a sense an invitation of the plaintiff by the defendant to use the stage. The appeal, must, in my opinion, be allowed, and judgment must be entered for the plaintiff.

COTTON, L. J. — BOWEN, L. J., concurs in the judgment I am about to read. [The opinion holds defendant liable, on the ground that he must be considered as having invited the workman to use the dock and all appliances provided by the dock-owner as incident to the use of the dock; and that he was under obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were furnished by him they were in a fit state to be used. The opinion then proceeds as follows:—]

This decides this appeal in favor of the plaintiff, and I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived.

Take, for instance, the case of *Langridge v. Levy*, *supra*, to which the principle, if it existed, would have applied. But the judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In other cases where the decision has been referred to, judges have treated fraud as the ground of the decision; as was done by Coleridge, J., in *Blackmore v. Bristol & Exeter Ry. Co.*, 8 E. & B. 1035; and in *Collis v. Selden*, L. R. 3 C. P. 495, Willes, J., says that the judgment in *Langridge v.*

Levy, supra, was based on the fraud of the defendant. This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in *Collis v. Selden, supra*, and in *Longmeid v. Holliday, supra* (in each of which the plaintiff failed), are, in my opinion, at variance with the principle contended for. The case of *George v. Skivington, supra*, and especially what is said by Cleasby, B., in giving judgment in that case, seems to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and the case was decided by Cleasby, B., on the ground that the negligence of the defendant which was his own personal negligence was equivalent, for the purposes of that action, to fraud, on which (as he said) the decision in *Langridge v. Levy, supra*, was based.

In declining to concur in laying down the principle enunciated by the Master of the Rolls, I in no way intimate any doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.

For the reasons stated I agree that the plaintiff is entitled to judgment, though I do not entirely concur with the reasoning of the Master of the Rolls.

Judgment reversed.

CHAPTER VII.

DUTY OF CARE ON THE PART OF OCCUPIER OF LAND OR BUILDINGS.

SECTION I.

Duty of Care towards Persons using Adjacent Public Way.

BARNES v. WARD.

1850. 9 *Common Bench (Manning, Granger, and Scott)*, 392.¹

MAULE, J., delivered the judgment of the Court.

This was an action on the case founded on the statute 9 & 10 Vict. c. 93, "An act for compensating the families of persons killed by accident," and brought by the administrator of Jane Barnes.

The declaration (as amended during the trial) alleged that the defendant before and at the time when, &c., was possessed of a messuage, with the appurtenances, near to a common and public foot-way in front and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said foot-way, and abutting upon and opening into the same, there then was a large hole, vault, pit, or area, which hole, &c., the defendant, by reason of the possession of the said messuage, with the appurtenances, before and at the said time when, &c., ought to have so sufficiently guarded, fenced off, and railed in, as to prevent damage or injury to any person or persons lawfully passing in or along the said foot-way; yet that the defendant, while he was so possessed of the said messuage, and the said hole, &c., and premises, with the appurtenances, and whilst there was such hole, &c., on &c., wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, &c., to be and continue, and the same was then so wholly unguarded and not fenced off or railed in, that, by means of the premises, and for want of proper and sufficient guarding, fencing off, and railing in of the same, the said Jane Barnes, who was lawfully passing in and upon the said foot-way, slipped and fell into the said hole, &c., and was thereby killed.

The defendant pleaded, — first, not guilty; secondly, that he was not possessed of the said messuage, with the appurtenances, in manner and form, &c.; thirdly, that he ought not, by reason of his possession of

¹ Statement of facts by reporter omitted; also arguments of counsel. — Ed.

the said messuage, &c., with the appurtenances, to have guarded, fenced off, and railed in the said hole, &c., in manner and form, &c. ; on which pleas issues were respectively joined.

At the trial, before Coltman, J., at the sittings in Middlesex, after Easter term, 1847, it appeared that Jane Barnes was passing, between eight and nine o'clock at night, on the 26th of October, 1849 [?], along a road which had on the one side of it a dead wall, and on the other a row of houses, some of which were finished and some unfinished. It being dark, and no light near, she accidentally fell from a path which was on the road by the side of the houses, into the open area of one of the unfinished ones, which was shown to have been at that time in the possession of the defendant, and was killed by the fall. The area was separated from the path by a curbstone which was intended for the reception of upright iron rails.

On the part of the defendant, it was contended : first, that there was no sufficient evidence that the footpath was a public way ; secondly, that a man has a right to make a hole in his own ground, and is not bound to fence an adjoining highway against such a hole ; thirdly, that the third issue was not sustained, in its terms, by the evidence.

The learned judge told the jury that, if there was a public way abutting on the area, and it would be dangerous to persons passing, unless fenced, or a public way so near that it would produce danger to the public, unless fenced, the defendant would be liable, unless the accident was occasioned by want of ordinary caution on the part of the deceased.

The jury found that there was an immemorial public way abutting on the area, and gave a verdict for the plaintiff, with 300*l.* damages.

The learned judge having given leave to the counsel for the defendant to move the Court, on the points suggested by him, a rule was obtained accordingly, to show cause why a nonsuit should not be entered ; and, further, why the judgment should not be arrested, on the ground that the declaration disclosed no good cause of action.

On the argument of this rule, before my brothers Coltman and Williams, and myself, it was contended, on behalf of the defendant : first, that the evidence on the part of the plaintiff furnished no case for the consideration of the jury, as to the existence of an immemorial public foot-way ; secondly, that the obligation of the defendant to fence off the area, was not properly described in the declaration ; thirdly, that no such obligation existed as that alleged ; for, that the owner of land is not bound to fence off an excavation in it by the side of a public road.

As to the first point, the Court was clearly of opinion that there was sufficient evidence to go to the jury, as to the existence of a public foot-way from time immemorial.

As to the second point, the objection was, that the liability of the defendant was alleged to exist in respect of the house and the appurtenances ; whereas, on the evidence, it appeared to exist, if at all, by

reason of the possession of the appurtenances alone, *i. e.* of the area. But the Court was of opinion that the declaration might be regarded as truly describing the origin of the liability of the defendant, *viz.*, that he was in the possession of a house, to which an area appertained, abutting on a public foot-way.

On the third point, however, the Court felt so much doubt and difficulty, that a second argument was directed, which took place in Easter term last, before Wilde, C. J., Coltman, J., Cresswell, J., and V. Williams, J.

The arguments for the plaintiff were, that, when a public way has existed from time immemorial, the public have a right to enjoy it with ease and security; and that, if a man prevents that enjoyment, even by the use of his own property, he is responsible as for a public nuisance. And the case was put, of the proprietor of land over which a public way passes, excavating his land on each side thereof, so as to leave the line of way running between two precipices; which, it was argued, would, in effect, make the way impassable, and therefore be a public nuisance. And the cases of *Coupland v. Hardingham*, 3 Campb. 398, and *Jarvis v. Dean*, 3 Bingh. 447 (E. C. L. R., vol. 11), 11 J. B. Moore, 354 (E. C. L. R., vol. 22), were cited.

Coupland v. Hardingham was an action on the case for negligence, in not railing in or guarding an area before a house in Westminster, whereby the plaintiff fell down into the area, and was severely hurt. The defence was, that the premises had been in the same condition as far back as could be remembered, and before the defendant became possessed of them. But Lord Ellenborough held, that, however long the premises might have been in this condition, as soon as the defendant took possession of them he was bound to guard against the danger to which the public had before been exposed; and that he was liable for the consequences of having neglected so to do, in the same manner as if he himself had originated the nuisance: and the learned judge said that the area belonged to the house, and it was a duty which the law cast upon the occupier of the house to render it secure.

Jarvis v. Dean was also an action on the case to recover damages for an injury occasioned to the plaintiff by his falling at night into an area, which the declaration alleged the defendant wrongfully and negligently to have left open at a house he possessed, in the parish of Islington, and in, near, and adjoining a certain street there, which was a common highway. The only point of law decided in the cause was, as to whether the evidence sufficiently proved a dedication of the road to the public. And the case is only an authority on the present subject, to this extent, *viz.*, that it appears to have been assumed as a matter beyond dispute, that the action was well founded, supposing the road was shown to have been a public one.

On the part of the defendant, it was argued, that no use which a man chooses to make of his own property can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful

enjoyment of that right; that, in the present case, the excavation of the area in no manner interfered with the way itself, or was in any sense hurtful or perilous to those who confined themselves to the lawful enjoyment of the right of way; and that it was only to those who, like the deceased, committed a trespass, by deviating on to the adjoining land, that the existence of the area, though not fenced, could be in any degree detrimental or dangerous.

In support of this view of the subject, reliance was placed on the case of *Blythe v. Topham*, 1 Roll. Abr. 88, Cro. Jac. 158, *supra*, 421 (b), where it was held that, if A., seised of a waste adjacent to a highway, digs a pit in the waste, within thirty-six feet of the highway, and the mare of B. escapes into the waste, and falls into the pit, and dies there; yet B. shall not have an action against A., because the making of the pit in the waste, and not in the highway, was not any wrong to B.; but it was the default of B. himself that his mare escaped into the waste. And, in further support of this doctrine, a passage was cited from the judgment of Alderson, B., in *Jordin v. Crump*, 8 M. & W. 782, where the case is put of a man who, passing in the dark along a foot-path, should happen to fall into a pit dug in the adjoining field, by the owner of it. "In such a case," says the learned judge (p. 788), "the party digging the pit would be responsible for the injury if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for the falling into it would be the act of the injured party himself." And, as to the case of *Coupland v. Hardingham*, it was not only denied to be law, by the counsel for the defendant, but it was further argued that, in that case, — as appeared by the original *nisi prius* record, procured by COLTMAN, J., — as also in *Jarvis v. Dean*, — the area was in one count alleged to be in the highway.

But it seems clear to us that, in each of these cases, the area in question was not parcel of the road, but was an area meant to be fenced off from it, in the ordinary way, by upright iron rails, so as to exclude the public from it, in a manner quite inconsistent with the notion of its being itself a part of the highway. And, with respect to the case of *Blythe v. Topham*, and the passage cited from the judgment in *Jordin v. Crump*, it must be observed that, in these instances, the existence of the pit in the waste or field adjoining the road is not said to have been dangerous to the persons or cattle of those who passed along the road, if ordinary caution were employed.

In the present case, the jury expressly found the way to have existed immemorially; and they must be taken to have found that the state of the area made the way dangerous for those passing along it, and that the deceased was using ordinary caution in the exercise of the right of way, at the time the accident happened.

The result is, — considering that the present case refers to a newly-made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care, — it appears to us, after much consideration, that the defendant, in having made that

excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.

With regard to the objection, that the deceased was a trespasser on the defendant's land at the time the injury was sustained, — it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained. Thus, in the case of *Bird v. Holbrook*, 4 Bingh. 628 (E. C. L. R., vol. 13, 15), 1 M. & P. 607 (E. C. L. R., vol. 17), the plaintiff was a trespasser, — and indeed a voluntary one, — but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred if the plaintiff had not trespassed on the defendant's land. This decision was approved of in *Lynch v. Nurdin*, 1 Q. B. 37, 4 P. & D. 677, and also in the case of *Jordin v. Crump*, in which the Court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal, agreed that, if it were, the fact of the plaintiff's being a trespasser would be no answer to the action.

For these reasons, we are of opinion that the declaration in this case discloses a good cause of action; and also that the third issue was properly found for the plaintiff.

The rule, therefore, must be discharged.

Rule discharged.

SECTION II.

Duty of Care towards Trespasser.

LARY v. CLEVELAND, &C. RAILROAD COMPANY.

1881. 78 *Indiana*, 323.¹

LARY sued the railroad company for damage alleged to have been sustained by him, through the negligent failure of the company to repair a building standing on its grounds, and formerly used by it as a freight house. Answer, a general denial. Upon the trial, the plaintiff introduced his evidence; the defendant demurred to it, and the plaintiff joined in demurrer. The Court sustained the demurrer, and the plaintiff excepted.

¹ Statement abridged. — Ed.

The facts which the plaintiff's evidence tended to prove are substantially as follows : —

The railroad company owned half an acre of land between the railroad track and a highway. On this land was a building erected several years before for a freight house. It was no longer used as the general freight house, though still used for storing the company's wood. A part of the roof of the building was off, and had been so for some months. The plaintiff, who was twenty years of age, was in the habit of passing the building almost daily, and had noticed that part of the roof was off. In a rain storm, the plaintiff went under the platform of the old freight house, and played there with other young people. A piece of the roof was torn off by the wind. The plaintiff, being frightened at the noise, ran out, saw the piece of the roof in the air, and ran towards the highway ; but before or as he reached the edge of it, this fragment of the roof fell upon him.

W. A. Kittinger, A. F. Harrison and W. R. Pierse, for appellant.

A. C. Harris, H. H. Poppleton, J. A. Harrison, and R. Lake, for appellee.

MORRIS, C. [After fully stating the case.] Upon the facts thus stated, can the appellant maintain this action?

There is no testimony tending to show that the appellant was at the freight house by the invitation of the appellee, nor that he was there for the purpose of transacting any business with the appellee. The appellant intruded upon the premises of the appellee, and is not, therefore, entitled to that protection which one, expressly or by implication, invited into the house or place of business of another, is entitled to. The appellant was a trespasser, and as such he entered upon the appellee's premises, taking the risks of all the mere omissions of the appellee as to the condition of the grounds and buildings thus invaded without leave. We do not wish to be understood as holding or implying that if, on the part of the appellee, there had been any act done implying a willingness to inflict the injury upon the appellant, it would not be liable. But we think there is nothing in the evidence from which such an inference can be reasonably drawn. The building could be seen by all ; its condition was open to the inspection of every one ; it had been abandoned as a place for the transaction of public business ; it was in a state of palpable and visible decay, and no one was authorized, impliedly or otherwise, to go into or under it. Under such circumstances, the law says to him who intrudes into such a place, that he must proceed at his own risk.

In the case of *The Pittsburgh, &c. R. W. Co. v. Bingham*, 29 Ohio St. 364, the question was : "Is a railroad company bound to exercise ordinary care and skill in the erection, structure, or maintenance of its station house or houses, as to persons who enter or are at the same, not on any business with the company or its agents, nor on any business connected with the operation of its road ; but are there without objection by the company, and therefore by its mere sufferance or permission?" The Court answered this question in the negative.

In the case of *Hounsell v. Smyth*, 7 C. B. N. s. 731, the plaintiff fell into a quarry, left open and unguarded on the unenclosed lands of the defendant, over which the public were permitted to travel; it was held that the owner was under no legal obligation to fence or guard the excavation unless it was so near the public road as to render travel thereon dangerous. That the person so travelling over such waste lands must take the permission with its concomitant conditions, and, it may be, perils. *Hardcastle v. The South Yorkshire R. W. Co.*, 4 H. & N. 67; *Sweeny v. Old Colony, &c. R. R. Co.*, 10 Allen, 368; *Knight v. Abert*, 6 Barr, 472.

After reviewing the above and other cases, Judge Boynton, in the case of the *Pittsburgh, &c. R. W. Co. v. Bingham*, *supra*, says:—

“The principle underlying the cases above cited recognizes the right of the owner of real property to the exclusive use and enjoyment of the same without liability to others for injuries occasioned by its unsafe condition, where the person receiving the injury was not in or near the place of danger by lawful right; and where such owner assumed no responsibility for his safety by inviting him there, without giving him notice of the existence or imminence of the peril to be avoided.”

In the case from which we have quoted, the intestate of the plaintiff was at the defendant's station house, not on any business with it, but merely to pass away his time, when, by a severe and sudden blast of wind, a portion of the roof of the station house was blown off the building and against the intestate, with such force as to kill him. The case, in its circumstances, was not unlike the one before us. *Nicholson v. Erie R. W. Co.*, 41 N. Y. 525; *Murray v. McLean*, 57 Ill. 378; *Durham v. Musselman*, 2 Blackf. 96 (18 Am. Dec. 133).

In the case of *Sweeny v. Old Colony, &c. R. R. Co.*, 10 Allen, 368, the Court say:—

“A licensee, who enters on premises by permission only, without any enticement, allurements, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils.” *Carleton v. Franconia Iron and Steel Co.*, 99 Mass. 216; *Harris v. Stevens*, 31 Vt. 79, 90; *Wood v. Leadbitter*, 13 M. & W. 838.

The evidence in this case brings it, we think, within the principles settled by the above cases.

The appellant contends that the evidence shows that the appellee was guilty of gross negligence in not repairing its freight house, and that such negligence renders it liable, though he entered upon its premises without invitation or license, as a mere intruder, and was, while such intruder, injured; and, in support of this proposition, we are referred to the following cases: *Lafayette, &c. R. R. Co. v. Adams*, 26 Ind. 76; *Indianapolis, &c. R. R. Co. v. McClure*, 26 Ind. 370; *Gray v. Harris*, 107 Mass. 492; *Isabel v. Hannibal, &c. R. R. Co.*, 60 Mo. 475.

In the first of the above cases, the Court held that, where the negligence of the company was so gross as to imply a disregard of consequences or a willingness to inflict the injury, it was liable, though the party injured was not free from fault. In the second case, it was held that a railroad company, not required to fence its road, would not be liable for animals killed on its road, unless guilty of gross negligence. The phrase "gross negligence," as used in these cases, means something more than the mere omission of duty; it meant, as shown by the evidence in the cases, reckless and aggressive conduct on the part of the company's servants. "Something more than negligence, however gross, must be shown, to enable a party to recover for an injury, when he has been guilty of contributory negligence." *The Pennsylvania Co. v. Sinclair*, 62 Ind. 301. There was, in the cases referred to in 26 Ind., something more than negligence. As in the case of *The Indianapolis, &c. R. W. Co. v. McBrown*, 46 Ind. 229, where the animal was driven through a deep cut, eighty rods long, into and upon a trestle work of the company, there was aggressive malfeasance. In the Massachusetts case, the Court held that a party building a dam across a stream must provide against unusual floods. We do not think these cases applicable to the one before us.

There could be no negligence on the part of the appellee, of which the appellant can be heard to complain, unless at the time he received the injury, the appellee was under some obligation or duty to him to repair its freight house. "Actionable negligence exists only where the one whose act causes or occasions the injury owes to the injured person a duty, created either by contract or by operation of law, which he has failed to discharge." *Pittsburgh, &c. R. W. Co. v. Bingham*, *supra*; *Burdeck v. Cheadle*, 26 Ohio St. 393; *Town of Salem v. Goller*, 76 Ind. 291. We have shown that the appellee owed the appellant no such duty.

The judgment below should be affirmed.

PER CURIAM. It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

LOUISVILLE & N. R. CO. v. HURT.

1890. *Court of Appeals of Kentucky*, 13 *South Western Reporter*, 275.¹

SUIT by Hurt against Railroad Company, for injury alleged to have been caused by neglect of company's servants in running its train.

Plaintiff, a boy about 11 years of age, climbed upon a freight-car, standing on a side track near a depot. An engine, with cars attached, moved on to the side track, and pushed the cars to which it was attached

¹ Statement abridged. Part of opinion omitted. — Ed.

back against the car upon which plaintiff was. The cars came together so hard, and with such a shock, that plaintiff fell off and the wheels of the car ran over his leg. After the testimony on the plaintiff's side was all in, the defendant moved for a peremptory instruction, which was refused. The defendant also asked the Court to give certain instructions which the Court declined to give. The instructions asked for are stated in the opinion. Verdict and judgment for plaintiff in the Circuit Court. Defendant appealed.

John McChord, H. W. Bruce, and Wm. Lindsay, for appellant.

Chas. Patteson, for appellee.

PRYOR, J. [After stating the case.] Some testimony was introduced showing that no railing was between the depot or the ground bordering on the switch and the switch itself, and that persons were in the habit of crossing this switch, and that no bell was rung or whistle blown by those in charge of the train.

All of this testimony was irrelevant and incompetent, as it could shed no light on the neglect of the boy in going on the car, or the neglect, if any, of the employees causing his injury. If he had been on the track, and out of the car, there might be great reason for permitting such testimony to go to the jury; but, when entering the car of the appellant without the knowledge or consent of the employees, and injured while on the car, without their knowledge, however great the concussion resulting from the act of coupling the cars, there is no ground for a recovery. The employees had no reason to anticipate the presence of boys in their freight-cars, either during the day or night; nor were they required to examine for the purpose of ascertaining whether the boys were on any part of the train. If they saw the boys, it was their duty to make them leave the car, and to exercise that degree of caution as would prevent their being injured; but the fact that they might have seen them constitutes no neglect on their part, as it was not incumbent on them to know who had climbed into their cars, or whether any one was in them before moving them. The boys were not employed to load the cars, or in the service of the appellant in any manner. They were all trespassers; and, the injury resulting from the boy's own neglect, the peremptory instruction should have been given. [Omitting part of opinion]. There is no pretence here that the employees, or any of them, saw the danger he was in; and therefore the testimony on each side fails to show any want of diligence on the part of the employees, or that the injury is to be attributed to their neglect. The instructions asked by defendant should have been given, which are, in substance, that if the plaintiff went upon defendant's car without the knowledge or consent of the defendant, or any of the employees, and was injured, they should find for the defendant, unless the employees, or some of them, knew the perilous position of the plaintiff, and failed to use the means within their power to prevent the injury.

This is unlike a case of running over a small boy on the track of its road at its depot, or in a town, where they had the right to suppose chil-

dren or others would likely attempt to cross their track. They should then give warning of the approach of the train, and use such diligence as within their power to prevent accidents to those upon or crossing their track. In this case the boys knew of the approach of the train, or, if ignorant of that fact, they were in a position where the employees had no right to anticipate they would be, whether old or young; and, the injury resulting from the neglect of the plaintiff, the defendant should not be made to respond in damages. It results, therefore, that the instructions asked by the plaintiff, and those given by the Court, were all erroneous, when applied to the facts of this case. In the case of *Railroad Co. v. Gastineau*, 83 Ky. 119, a boy 15 years of age was killed while trying to uncouple a car in the company's yard. It was held, after determining that the boy was at a place where he had no right to be, that the company was not compelled to anticipate his presence, and, in case of injury, no cause of action existed, unless, after the discovery of the boy's peril, they failed to exercise a proper degree of care in order to prevent the injury. Judgment reversed, and remanded for a new trial in conformity with this opinion.

WHITE v. TWITCHELL.

1853. 25 *Vermont*, 620.¹

TRESPASS on the case, to recover damages which the plaintiff sustained by the falling of a staging erected for his own use, in consequence of the defendant having removed one of the staging poles. Plea, the general issue, and trial by jury. On the trial, the plaintiff offered evidence tending to prove that the staging named in the declaration, and which was affixed to the barn of a Mr. Wilder, was weakened and rendered insecure, by reason of the defendant removing, in the plaintiff's absence, and without his knowledge, therefrom a wooden bar, which formed one of the supports of said staging. The plaintiff introduced further testimony tending to prove, that bodily injury happened to him by reason of the said weakening of said staging, and his going upon the same, without knowing of said change in its condition. The defendant then offered evidence, tending to prove that said bar was his property and belonged to a bar-way in an adjoining lot, and that it had been taken from his premises, and used as aforesaid by the plaintiff, without the defendant's permission. The evidence of the plaintiff also tending to prove, that reasonable effort was not made by defendant, if such effort was required by law, to give notice to the plaintiff of the removal of said bar from said staging, or of the unsafe condition of the same, by reason of said removal. The Court instructed the

¹ Statement abridged. — Ed.

jury, that if they found all the facts which the plaintiff's evidence tended to prove, still the defendant would be entitled to recover, in the event of their finding that the bar aforesaid was the defendant's property, and that it was taken and used by the plaintiff as aforesaid, without the defendant's permission, and that defendant did no more to the plaintiff's staging than was necessary to recaption of said bar. The jury returned a verdict for defendant. To the above charge of the Court the plaintiff excepted.

D. Kellogg and O. L. Shafter, for plaintiff.

1. On the facts which the evidence of the plaintiff tended to prove, the bar was his property, at the time it was taken from the staging, on the ground of "accession." Bac. Abr. 580; 2 Kent's Com. 297; *Stevens v. Briggs*, 5 Pick. 177; *Cross v. Marston*, 17 Vt. 540. And it was error in the Court to omit so to charge, for it was a point material to the decision of the case, and one upon which there was evidence.

2. In recapturing the bar, the defendant was bound not only to do no unnecessary damage, in the act of retaking, but was farther bound to use all that care and diligence which considerate men of ordinary thoughtfulness and humanity would not fail to use under similar circumstances, to prevent an injury, which the act of taking itself portended as the proximate and probable consequence of the act. *Sic utere tuo ut alienum non lædas*. White had a right to use the staging, though supported in part by the defendant's bar, and therein to be secure in his life and limbs; still the defendant had the right of recapture; but conflict, in the legal exercise of these rights, could be avoided, by subjecting the exercise of both of them to the law of ordinary care throughout. One impounding cattle in a private pound must feed them, — if in special pound overt, must give notice. Black. Com. 12; *Clark v. Adams*, 18 Vt. 425; *Davis v. Campbell*, 23 Vt. 236; 9 E. C. L. 280.

J. E. Butler, J. D. Bradley, and H. E. Stoughton, for defendant.

I. The defendant had the right to recapture the bar. 1. Once his, it remains so until he either voluntarily parts with it, or it should be taken from him by operation of law. 2. If taken from him wrongfully, he was justified in peaceably retaking it. 3 Black. Com. 3; 1 Dane Abr. 132; Story on Bailments, 36, and cases cited. 3. And this property of his in the article, whatever it was, remained unchanged by the plaintiff's wrongful act; if absolute, it remains absolutely his; and no mere wrong of the plaintiff could make it conditional. 4. But the plaintiff's claim supposes what was absolutely the defendant's to become only conditionally his, and that he can only use it, on condition that he shall give notice or make certain efforts to do so. II. The plaintiff's view of this case applies to the absolute owner the obligations which the law imposes on bailees. 1. What more could he require of us, if the article were his, and he had given a general license to use it? 2. A horse was actually owned in this neighborhood, which afterwards killed in his stable at the South two negroes. Suppose a

trespasser rode him off, how much effort does the law exact of the owner, to follow and give notice of the danger? 3. Is this legal obligation any stronger on the owner than on any other person who becomes aware of the peril of the wrong-doer? 4. Benevolence and Christian charity would doubtless suggest in different men different degrees of effort to save the wrong-doer; but this is not a court of benevolence, it is a court of law.

The opinion of the Court was delivered by BENNETT, J. — This is a special action on the case, to recover damages which the plaintiff sustained by reason of the falling of a staging, which he had erected for his own use, in consequence of the defendant's having removed one of the staging poles, which was unknown to the plaintiff when he went upon the staging.

Under the charge of the Court, the jury must have found that the staging pole which the defendant removed was, when taken by the plaintiff, the property of the defendant, and that it was taken without his permission, and that defendant did no more to the plaintiff's staging than was necessary to repossess himself of the bar, or staging pole. The only question in the case relates to the defendant's right to recapture the bar, under the state of facts found in the bill of exceptions, and whether he was bound to give notice to the plaintiff of its removal. The plaintiff was a trespasser in taking the bar or pole to use in the erection of his staging; and when property is so taken from the owner, the right of recaption exists, unless there is something in the case to take it away. It cannot with propriety be claimed that the plaintiff acquired a property in the bar, by the principles relative to the acquisition of rights by accession. Though the pole or bar belonging to the defendant was annexed to, and became a part of, the plaintiff's staging, yet it did not lose its identity; and the general principle is, that so long as the identity of the original material can be proved, the right of the original owner is preserved in the property. Besides, even the civil law would not allow a party to acquire a title by accession, founded upon his own act, unless he had taken the materials in ignorance of the true owner, and the materials were not capable of being restored to their original form; and by the English law, he could not claim title by accession, if he took the property of another by a wilful trespass. This was necessary to avoid the giving of encouragement to trespasses. In the present case, there is no pretence that the plaintiff took the bar by mistake, or under a supposed right of title, and it must be taken to be a wilful trespass on his part. The property in the bar remaining in the defendant, he was justified in the recaption of it, unless rendered unlawful from the time, or the manner in which he exercised the right. As the bar was removed from the staging in the absence of the plaintiff, it was claimed that the defendant should have given him notice of it, or at least should have used reasonable diligence to have done it. But we think no such duty was imposed upon him.

The right of the defendant was absolute, and not dependent upon

his giving notice, and the maxim, *sic utere tuo, &c.*, will not apply, for the reason that the plaintiff had no right in the use of the bar to injure. He was, all the time he continued in the use of the bar as a part of his staging, but a tortfeasor. It was his business to see that the staging was safe before he went upon it, and if he did not, it must be his misfortune, and not that of the defendant. Though the plaintiff may have sustained damage, yet it is *damnum absque injuria*, and the judgment of the County Court is affirmed.

PHILLIPS v. WILPERS.

1869. 2 *Lansing (New York Supreme Court)*, 389.¹

THE plaintiff was by trade a painter, and for the purpose of painting the front of a three-story house in the city of Albany, fastened one of the ropes of his scaffold, by tying it to the chimney of the house adjoining, which belonged to, and was occupied by the defendant; and having been injured on account of the falling of the scaffold, brought a suit to recover damages therefor from the defendant.

Upon the trial, he proved that the accident happened on Monday morning, as he went upon the scaffold to his work; that the scaffold had been hung and carefully tried on the previous Saturday; that the rope in question was securely tied to the chimney, and that the scaffold fell on account of its having unfastened therefrom. One Smallman, a boy of the age of fourteen years, testified for the plaintiff, that he saw the defendant on the evening preceding the accident, on the roof of his house along side of the chimney, with the rope of the scaffold in his hands; the witness testified, that he saw the defendant under such circumstances, while he, the witness, was in the yard, in the rear of the house, in a position from which he could see some three feet of the chimney. The plaintiff's brother testified that he had charged the defendant with causing the accident, soon after its occurrence, and with untying the rope, and that the defendant was excited and troubled, and did not deny the charge, and in reply to a suggestion from the witness, that he would pay the doctor's fees, &c., said, that he would if they were not made too big.

[Defendant introduced testimony tending to contradict Smallman.]

The Court refused a nonsuit at close of plaintiff's testimony; but, on application after the defendant's testimony had been given, granted it. Plaintiff appealed.

R. W. Peckham, Jr., for appellant.

Isaac Lawson, for respondent.

Present: INGALLS, HOGEBROOM, and PECKHAM, JJ.

¹ Part of case omitted. — Ed.

By the Court, — INGALLS, P. J. [The Court held that the evidence did not preponderate so overwhelmingly in favor of defendant as to justify taking the case from the jury. After deciding that the nonsuit should not have been granted, the opinion proceeds as follows: —]

It is further insisted by the counsel for the defendant, that the defendant was justified in removing the rope because it was attached to the chimney without his permission. That would be so under certain circumstances, but that right must be exercised in such manner as not to betray a reckless disregard of the safety of others. A technical trespass would not justify the infliction of irreparable injury, and the assertion of a right must be qualified by a reasonable regard for the security of others. It is said that the defendant had no reason to infer that the rope sustained the scaffold. I think it was for the jury to say whether he should not have ascertained the fact before he loosed it, and whether it should not have occurred to a reasonable mind that the rope was attached to the chimney to subserve some purpose, and not placed there through mere wantonness. If the defendant intended to remove the rope, which he doubtless had a right to do properly, he was bound to exercise reasonable prudence, and to have accomplished the work in such manner as to give notice to those who could be affected thereby. If the jury should conclude that the defendant only partially unloosed the rope, so that while it appeared to those who went upon the scaffold to be secure, yet when weight was applied it gave way, they might regard it little better than a trap well calculated to produce serious injury. Under such circumstances, an act which in itself might be lawful would, by the manner in which it was executed, become unlawful and subject the party to damages.

[Remainder of opinion omitted.]

New trial granted.

MAYNARD v. BOSTON AND MAINE RAILROAD.

1874. 115 *Massachusetts*, 458.¹

TORT for the killing of a horse on a railroad by a locomotive engine.

Upon the trial, the plaintiff admitted that the horse must be considered as trespassing upon the railroad, but contended and offered evidence tending to show that by an exercise of proper care the injury to the horse might have been avoided. The defendants offered evidence to control this, and tending to show that they did all they reasonably could do to stop their train before striking the horse. There was no evidence of any wanton misconduct on their part.

The counsel for the defendants contended and asked the presiding judge to rule, that the defendants would not be liable, unless the plain-

¹ Statement abridged. Argument omitted. — Ed.

tiff proved a reckless and wanton misconduct of their employees in the management of the train when the horse was killed. The presiding judge declined so to rule; but did rule that though the horse was trespassing upon the defendants' land at the time, the managers of the train could not carelessly run over him, but were bound to use reasonable care to avoid injuring him, and that if the jury found that by the exercise of reasonable care they might have avoided injuring the horse, they would be liable. The jury found for the plaintiff, and the defendants alleged exceptions.

C. P. Judd and *C. F. Choate*, for defendants.

S. J. Thomas, for plaintiff.

GRAY, C. J. If the horse had been rightfully upon the defendants' land, it would have been their duty to exercise reasonable care to avoid injuring the horse. But it being admitted by the plaintiff that his horse was trespassing upon the railroad, they did not owe him that duty, and were not liable to him for anything short of a reckless and wanton misconduct of those employed in the management of their train. The defendants were therefore entitled to the instruction which they requested. *Tonawanda Railroad v. Munger*, 5 Denio, 255; s. c. 4 Comst. 349; *Vandegrift v. Rediker*, 2 Zab. 185; *Railroad Co. v. Skinner*, 19 Penn. St. 298; *Tower v. Providence & Worcester Railroad*, 2 R. I. 404; *Cincinnati, Hamilton & Dayton Railroad v. Waterson*, 4 Ohio St. 424; *Louisville & Frankfort Railroad v. Ballard*, 2 Met. (Ky.) 177.

The instruction given to the jury held the defendants to the same obligation to the plaintiff as if his horse had been rightfully on their land; and made their paramount duty to the public of running the train with proper speed and safety, and their use of the land set apart and fitted for the performance of that duty, subordinate to the care of private interests in property which was upon their track without right.

Some passages in the opinion in *Eames v. Salem & Lowell Railroad*, 98 Mass. 560, 563, were relied on by the plaintiff's counsel at the argument, and apparently formed the basis of the rulings of the learned judge in the Court below. But in that case there was no evidence of any negligence or misconduct in the management of the train, and an exact definition of the defendants' liability, by reason of such negligence or misconduct, was not required. In the present case such a definition was requested by the defendants in appropriate terms, and was refused, and for that refusal their

Exceptions must be sustained.

PALMER v. NORTHERN PACIFIC RAILROAD COMPANY.

1887. 37 *Minnesota*, 223.

APPEAL by defendant from an order of the District Court for Wadena County, Baxter, J., presiding, refusing a new trial.

John C. Bullitt, for appellant.

B. F. Hartshorn, for respondent.

GILFILLAN, C. J. Action for running upon and killing plaintiff's horse. The horse was at large in a public highway, grazing near the crossing of defendant's road, when, a train of cars coming along at its usual speed, the horse ran upon the track, in front of the train, and the train ran upon and killed it. It does not appear that the electors of the town had determined where cattle, horses, etc., should be permitted to go at large. The horse was therefore wrongfully in the highway. It is doubtful that the evidence as to the defendant's negligence, and also as to contributory negligence on the part of plaintiff, was such as to justify submitting the case to the jury. Conceding, however, that it was, still there must be a new trial for refusal of the Court to instruct the jury as requested by defendant.

There were several requests on its behalf, presenting, in various forms, practically the same proposition, which the Court refused to give. We need specify only two of them, as they express the gist of all: "If the jury believe from the evidence that the plaintiff's horse, at the time of the injury complained of, was running at large, it is instructed that the verdict must be for defendant, unless it further believes that, after the discovery of the peril of the horse, the defendant's servants were guilty of negligence," and that if the horse was running at large, plaintiff, in order to recover, must prove two facts, viz.: "That, prior to actually striking the horse, the defendant's servants discovered its peril;" and "that, after the discovery of the horse's peril, defendant's servants failed to do something which they ought to have done to avoid striking it, and which, if done, would have been effectual to prevent the collision."

These propositions, or rather, this proposition twice stated, is in exact accord with what was decided by this Court in *Locke v. First Div., &c. R. Co.*, 15 Minn. 283, (350,) and reiterated in *Witherell v. Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410. It is true those were cases where the animals were wrongfully upon the lands of the railroad company, while in this it was wrongfully upon the highway, at the place where the trains had a right to cross, — there through the fault of the plaintiff, and not of defendant. This difference makes no difference in the principle. In either case those in charge of the train were not bound to presume that the animal would be where it was. They "had a right to presume that the plaintiff would keep her at home, where alone she be-

longed ; consequently they owed no duty to plaintiff to look ahead, and see where the animal was." *Locke v. First Div., &c. R. Co., supra.* Their duty to persons or animals rightfully on the highway would have required them to be on the lookout to ascertain if there was any chance of injury to such persons or animals ; but with that duty, and its extent and its observance, the plaintiff, whose animal, through his own fault, was wrongfully there, had no concern. Defendant is no way answerable to plaintiff for any neglect in its duty towards others. Without any duty to anticipate that the horse might be in danger, or to exercise care to ascertain if it was in danger, the duty of those in charge of the train of cars in respect to the horse arose from the time they discovered it was in danger.

Order reversed.

STRONG, J., IN BROWN v. HUMMELL.

1863. 44 *Pennsylvania State Reports*, 378-380.

It is time it should be understood in this State, that the use of a railroad track, cutting, or embankment is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must be so held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries it is a penal offence to go upon a railroad. With us, if not that, it is a civil wrong of an aggravated nature, for it endangers not only the trespasser but all who are passing or transporting along the line. As long ago as 1852 it was said, by Judge Gibson, with the concurrence of all the Court, that "a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the highest attainable rate of speed, with which neither the person nor property of another may interfere."

The company on the one hand, and the people of the vicinage on the other, attend respectively to their particular concerns, with this restriction of their acts, that no needless damage be done. But the conductor of a train is not bound to attend to the uncertain movements of every assemblage of those loitering or roving cattle by which our railways are infested. *Railway Company v. Skinner*, 7 Harris, 298. So in *Railroad v. Norton*, 12 Id. 465, it was said, "That until the legislature shall authorize the construction of railroads for something else than travel and transportation, we shall hold any use of them for other purposes to be unlawful, if not indeed a public offence punishable by indictment." But if the use of a railroad is exclusively for its owners, or those acting under them ; if others have no right to be upon it ; if they are wrong-doers whenever they intrude, the parties lawfully using

it are under no obligations to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to, but they have a right to presume and act on the presumption that those in the vicinity will not violate the laws; will not trespass upon the right of a clear track; that even children of a tender age will not be there, for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act. It is true that what amounts to ordinary care under the circumstances of a case is generally to be determined by the jury. Yet a jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precaution against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty and negligence. Such is this case. The defendants had no reason to suppose that either man, woman, or child might be upon the railroad where the accident happened. They had a right to presume that no one would be on it, and to act upon the presumption. Blowing the whistle of the locomotive, or making any other signal, was not a duty owed to the persons in the neighborhood, and consequently the fact that the whistle was not blown, nor a signal made, was no evidence of negligence. Were it worth while, abundant authority might be cited to show that the law does not require any one to presume that another may be negligent, much less to presume that another may be an active wrong-doer. The principle was asserted in *Brown v. Lynn*, 7 Casey, 510, and in *Reeves v. The Delaware, Lackawanna & Western Railroad Company*, 6 Id. 454. It is too well founded in reason, however, to need authority. We act upon it constantly, and without it there could be no freedom of action. There is as perfect a duty to guard against accidental injury to a night intruder into one's bed-chamber as there is to look out for trespassers upon a railroad where the public has no right to be.

And the rule must be the same whether the railroad is in the vicinage of many or few inhabitants. In the one case as in the other, going upon it is unlawful, and therefore need not be expected. In this case, it appears that there are fifteen houses between the railroad and the public highway, all but two of them built since the railroad was constructed. The danger of trespassing may have been increased by the increase of the population, but the standard of duty in the use of one's property is not elevated or depressed by a varying risk of unlawful intrusions upon his rights.

Of course we are not speaking of the duties of railway companies to the public at lawful crossings of their railways. We refer only to their obligations at points where their right is exclusive; and as we find no

evidence of any negligence of the defendants which caused an injury to the plaintiff, we think the jury should have been so instructed, and the third and fifth points of the defendant should have been affirmed.

SOMERVILLE, J., IN SOUTH & NORTH ALA. R. CO. v. DONOVAN.

1887. 84 *Alabama*, 146, 147.

THE plea of the defendant numbered one was defective in failing to aver that the employees in charge of the train used proper diligence in keeping a lookout for obstructions on the track, including in this case the plaintiff's son, for whose injury the father brings the present action. The plea avers that the infant son was trespassing upon the track, at a point where there was no public crossing, to which the defendant company had the exclusive right, and that so soon as its employees discovered the boy all available preventive measures were adopted to avert the injury. This plea admits the averments of the complaint that the alleged trespass occurred within the corporate limits of the city of Birmingham, and that the train was running at a rate of speed in excess of that prohibited by an ordinance of the city. It rests, therefore, upon the idea that there is no duty devolving on a railroad company, under these circumstances, to keep any lookout for trespassers who walk upon or cross its track at any other place than public crossings, even within the corporate limits of a city, — it may be a populous city, and within the business portion of it, where necessity may often compel this kind of trespassing, or common usage give color of sanction to it under the form of an implied license. Railroad companies operated by steam-power are required to use very great care, and this care must be graduated to suit the exigency of increased danger, whether to employees, passengers, or the public. We cannot say that it was not the duty of the persons who were managing the train, under the circumstances of this case, to keep a vigilant outlook even for trespassers, and that a failure to do so would not be negligence. The decisions of this Court support the contrary conclusion, at least where the injury occurs in the streets of a city, town, or village. What the rule would be where a naked trespasser on the track is injured in the open country, or elsewhere, by the failure of the railroad engineer to keep a vigilant lookout, is an open question in this State, upon which we now express no opinion. Code, 1886, § 1144; *S. & M. R. R. Co. v. Shearer*, 58 Ala. 672, 678; *S. & N. Ala. Co. v. Sullivan*, 59 Ala. 272; *Frazer v. S. & N. Ala. R. R. Co.*, 81 Ala. 185; *Freer v. Cameron*, 55 Amer. Dec. 674, note.

SOMERVILLE, J., IN CARRINGTON v. LOUISVILLE & N. R. CO.

1889. 88 *Alabama*, 476.

THE deceased was a trespasser, and had no lawful right to walk on the defendant's right of way. There was, therefore, no duty devolving on the engineer to anticipate or expect such an unlawful trespass; and hence no duty existed to keep a vigilant lookout for the perpetrator, in the absence of some special fact or reason which called for diligence in this particular. *Bentley v. Railway Co.*, 86 Ala. 484, citing *Womack's Case*, 84 Ala. 149, *Blanton's Case*, 84 Ala. 154; *Donovan's Case*, 84 Ala. 141.

CINCINNATI, &C. RAILROAD COMPANY v. SMITH.

1871. 22 *Ohio State Reports*, 227.¹

ERROR to the Court of Common Pleas of Fayette County, reserved in the District Court.

The plaintiff below, Richard Smith, sued the defendant below, the Cincinnati & Zanesville Railroad Company, to recover the value of two horses alleged to have been killed through the negligence of the servants of the defendant in operating one of its trains. The inclosure of the plaintiff adjoined the railroad of the defendant; and from this inclosure, on the night on which the horses were killed, they escaped on to the railroad.

The Court, among other things, charged the jury as follows: —

The defendant's servants in this case were not bound to use extraordinary care or extraordinary means to save the plaintiff's horses. But they were bound to use what, in that peculiar business, is ordinary care and diligence; and if the loss of the horses was the result of a want of that ordinary care and diligence, the defendant is liable.

The defendant had the right to the free and unobstructed use of its railroad track. And the paramount duty of the employees is the protection of the passengers and property in the train, and the train itself.

But this being their paramount duty, they are bound to use ordinary care and diligence, so as not unnecessarily to injure the property of others.

Under the circumstances of the case, could and would reasonably prudent men, skilled in that kind of business, keeping in view as their paramount duty the protection and safety of the train, its passengers, and the property on and about it intrusted to their care, in the exercise of ordinary care have stopped the train and saved the horses? If so,

¹ Statement rewritten; part of case omitted; argument omitted. — Ed.

and the defendant's servants did not so act, the defendant is liable in this case ; otherwise the defendant is not liable.

In considering the paramount duty of the employees in the proper management of the train for the safety of passengers and property of its train, you have a right to determine whether they have other duties to perform. It is claimed the engineer had other duties than watching the track to perform, which were necessary for the safety of the passengers and property of the train,—such as gauging his steam, watching time-table, regulating his supply of water, examining his machinery, watching for the station-signal, etc. If such were the case, he had a lawful right to perform these duties, and was not bound to neglect them to save the plaintiff's horses, nor bound to watch the track while performing these duties. They were only bound, under the circumstances of the case, to use ordinary care and diligence to save the horses,—the safety of the passengers and property of the train being their paramount duty ; and if the jury find from the evidence that the persons in charge of the engine were attending to the duties of the train approaching the station at the time of the accident, these duties were paramount to watching the track for trespassing animals ; and if the horses were not, on that account, discovered in time to save them by using ordinary means to stop the train, the defendant is not liable.

It is claimed by the defendant's counsel that off the crossings of the railroad the servants of the railroad company have a right to presume that there are no trespassers on the roadway ; that they are not bound to look out for trespassers except for the safety of passengers or property in charge. It is also claimed that inasmuch as the road at the place where the plaintiff's horses got on the track and were killed was fenced, on that account the defendant's servants in charge of the train were not bound to look out for trespassing stock. Upon this question I only can charge you this : That if the railroad was fenced at the place where the horses got on and were killed, and this was known to the defendant's employees, you have a right to look to that circumstance as reflecting upon and in determining whether the employees exercised ordinary care in the management of the train. But if they might, in the exercise of ordinary care, have discovered the animals, although they were trespassers on the roadway, other than at a crossing, in time to have prevented their destruction, it was their duty to do so ; and if from such want of ordinary care they were not discovered in time to prevent their destruction, the defendant is liable for their loss to the plaintiff.¹

J. D. Wallace, for plaintiff in error.

R. A. Harrison, for defendant in error.

WHITE, J. The whole charge is set out in the bill of exceptions. Considering its several parts in connection, and giving to the whole a

¹ The above portions of the instructions are set out in the argument of counsel, pp. 235-237.

fair construction, we deem it necessary only to notice two particulars in which it is objected to.

These are: 1. Whether the fact that the horses were trespassing on the track excused the servants of the defendant from the exercise of ordinary care; and, 2. Whether that fact, and the additional one that the road was fenced, excused the engineer, as respects the owner of stray animals, from looking ahead to see whether such animals were on the track or not.

In regard to the first of these particulars, it is contended on behalf of the railroad company that, as the horses were trespassing on the railroad, the company was exempt from using ordinary care to save them, and that it was only liable for what is called gross negligence.

The Court instructed the jury that the defendant had the right to the free and unobstructed use of its railroad track, and that the paramount duty of its employees was the protection of the passengers and property in the train, and the train itself. But this being their paramount duty, they were bound to use ordinary care and diligence so as not unnecessarily to injure the property of others.

We think the charge stated the law correctly. We see no good reason, in principle, why a party, so far as may be consistent with the full enjoyment of his own rights, ought not to use ordinary care so as not unnecessarily to injure the property of others.

It is true, the rule contended for by the counsel of the plaintiff in error is sustained by a number of authorities. But the later and better considered cases are to the contrary. *Illinois Central R. R. Co. v. Middlesworth*, 46 Ill. 494; *Bemis v. Conn., &c. R. R.*, 42 Vt. 375; *Isbell v. N. Y. R. R. Co.*, 27 Conn. 393; *Redfield's American Railway Cases*, 355, 356.

The rule contended for has never been adopted in this State. It is, moreover, as respects railroad companies, inconsistent with our statute law on the subject. S. & C. 331.

The facts in the case of the *C. H. & D. R. R. Co. v. Waterson & Kirk*, 4 Ohio St. 424, cited and relied upon by the counsel of the plaintiff in error, were different from those in the case now before us, and we do not regard the rule there laid down as to the liability of the company in that case as applicable to this.

From what has been said of the charge in the first particular named, it would seem to follow that it is unobjectionable as respects the second. If it was the duty of the servants of the company, so far as was consistent with their other and paramount duties, to use ordinary care to avoid injuring animals on the track, they were, of course, bound to adopt the ordinary precautions to discover danger, as well as to avoid its consequences after it became known.

The fact that the road was fenced at the place of collision with the horses, was a circumstance to be considered in connection with the other circumstances of the case in determining whether the engineer was guilty of negligence in not looking ahead and discovering the danger

in time to avoid it. The fact that the road was fenced rendered it less probable that wandering animals would be on the track; but it cannot be said that the engineer, as a matter of law, by reason of the fences, was wholly excused from keeping a lookout ahead of the train.

If the servants of the company in charge of the train, having due regard to their duties for the safety of the persons and property in their charge, could, by the exercise of ordinary care, have seen and saved the horses, we think they were bound to have done so. *Bemis v. Conn., &c. R. R., supra*, 381; *Louis. & Nash. R. R. Co. v. Wain-scott*, 3 Bush, 149.

Judgment affirmed.

FROST v. EASTERN RAILROAD.

1886. 64 *New Hampshire*, 220.

CASE, for personal injuries from the alleged negligence of the defendants in not properly guarding and securing a turn-table. The plaintiff, who sues by his father and next friend, was seven years old when the accident occurred, June 23, 1877, and the action was commenced June 7, 1884. Plea, the general issue and statute of limitations. A motion for a nonsuit was denied, and the defendants excepted. Verdict for the plaintiff. The facts are sufficiently stated in the opinion.

Dodge & Caverly and *W. J. Copeland*, for plaintiff.

J. S. H. Frink and *C. B. Gafney*, for defendants.

CLARK, J. The action is not barred by the statute of limitations. "Any infant, married woman, or insane person may bring any personal actions within two years after such disability is removed." G. L., c. 221, s. 7.

As a general rule, in cases where a disability exists when the right of action accrues, the statute does not run during the continuance of the disability, and it has not commenced to run against the plaintiff. *Pierce v. Dustin*, 24 N. H. 417; *Little v. Downing*, 37 N. H. 356. It is said that the plaintiff's next friend was under no disability, that he could have brought the action at any time within six years after the right of action accrued, and therefore the statute should apply to this case. It is an answer to this suggestion that it is the infant's action, and the failure of the next friend to bring suit within six years is no bar to the plaintiff's right of action. Wood Lim. of Act. 476.

The motion for a nonsuit raises the question whether there was evidence upon which the jury could properly find a verdict for the plaintiff. *Paine v. Railway*, 58 N. H. 611. The ground of the action is, that the defendants were guilty of negligence in maintaining a turn-table insecurely guarded, which, being wrongfully set in motion by older boys, caused an injury to the plaintiff, who was at that time seven years old, and was attracted to the turn-table by the noise of the older and larger

boys turning and playing upon it. The turn-table was situated on the defendants' land, about sixty feet from the public street, in a cut with high, steep embankments on each side; and the land on each side was private property and fenced. It was fastened by a toggle, which prevented its being set in motion unless the toggle was drawn by a lever, to which was attached a switch padlock, which being locked prevented the lever from being used unless the staple was drawn. At the time of the accident the turn-table was fastened by the toggle, but it was a controverted point whether the padlock was then locked. When secured by the toggle and not locked with the padlock, the turn-table could not be set in motion by boys of the age and strength of the plaintiff.

Upon these facts we think the action cannot be maintained. The alleged negligence complained of relates to the construction and condition of the turn-table, and it is not claimed that the defendants were guilty of any active misconduct towards the plaintiff. The right of a landowner in the use of his own land is not limited or qualified like the enjoyment of a right or privilege in which others have an interest, as the use of a street for highway purposes under the general law, or for other purposes under special license (*Moynihan v. Whidden*, 143 Mass. 287), where care must be taken not to infringe upon the lawful rights of others. At the time of his injury the plaintiff was using the defendants' premises as a playground without right. The turn-table was required in operating the defendants' railroad. It was located on its own land so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers. *Aldrich v. Wright*, 53 N. H. 404. Under these circumstances, the defendants owed no duty to the plaintiff; and there can be no negligence or breach of duty where there is no act or service which the party is bound to perform or fulfil. A landowner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises; and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger. *Clark v. Manchester*, 62 N. H. —; *State v. Railroad*, 52 N. H. 528; *Sweeny v. Railroad*, 10 Allen, 368; *Morrissey v. Railroad*, 126 Mass. 377; *Severy v. Nickerson*, 120 Mass. 306; *Morgan v. Hallowell*, 57 Me. 375; *Pierce v. Whitcomb*, 48 Vt. 127; *McAlpin v. Powell*, 70 N. Y. 126; *St. L., V. & T. H. R. R. Co. v. Bell*, 81 Ill. 76; *Gavin v. Chicago*, 97 Ill. 66; *Wood v. School District*, 44 Iowa, 27; *Gramlich v. Wurst*, 86 Pa. St. 74; *Cauley v. P. C., & St. Louis Railway Co.*, 95 Pa. St. 398; *Gillespie v. McGowan*, 100 Pa. St. 144; *Mangan v. Atterton*, L. R. 1 Ex. 239. The maxim that a man must use his property so as not to incommode his neighbor, only applies to neighbors who do not interfere with it or enter upon it.

Knight v. Abert, 6 Pa. St. 472. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it.

We are not prepared to adopt the doctrine of *Railroad Co. v. Stout*, 17 Wall. 657, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit-tree bound to cut it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. "The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public and not to another, under the same circumstances. In this respect children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public must as a rule have reference to all classes alike." *Nolan v. N. Y. & N. H. & H. Railroad Co.*, 53 Conn. 461.

There being no evidence to charge the defendants with negligence, the motion for a nonsuit should have been granted.

Exceptions sustained.

KEFFE v. MILWAUKEE AND ST. PAUL RAILWAY CO.

1875. 21 *Minnesota*, 207.

THE plaintiff, an infant, brought this action in the Court of Common Pleas for Ramsey County to recover damages for injuries sustained while playing upon a turn-table of defendant. The circumstances under which plaintiff was injured are thus stated in the complaint: "That in connection with said railroad" [of defendant] "defendant, before and up to the month of October, 1867, used and operated a certain turn-table, located on the lands of said defendant in said town of Northfield, which said turn-table was so constructed and arranged as to be easily turned around and made to revolve in a horizontal direction."

After minutely describing the turn-table, the complaint proceeds: "That said turn-table was situated in a public place, near to a passenger depot of the defendant, and within 120 feet from the residence and home of plaintiff. That said turn-table was unfastened and in no way protected, fenced, guarded, or enclosed, to prevent it from being turned around at the pleasure of small children, although the same could at all times be readily locked and securely fastened.

"That said turn-table . . . was in the possession and under the control of defendant, and not necessary in operating said railroad, and it was the duty of said defendant to keep said turn-table fastened or in some way protected, so that children could not readily have access thereto and revolve the same. That the same was not so protected or fastened, and that said turn-table, when left unfastened, was very attractive to young children, and that while the same was being moved by children, and at all times when left unfastened, it was dangerous to persons upon or near it.

"That defendant had notice of all the aforesaid facts before and at the time the injury herein named occurred to the plaintiff.

"That plaintiff, on September 11, 1867, was a child of tender years, without judgment or discretion, he being at that date seven years old, and that in consequence of the carelessness, negligence, and improper conduct of said defendant, in not locking, enclosing, or otherwise fastening said turn-table, and by the negligence, carelessness, and improper conduct of said defendant, its agents, and servants, in allowing said turn-table to be and remain unfastened, insecure, and improperly put in motion, it was, at the date last aforesaid, revolved by other children, over whom the parents and guardians of plaintiff had no control, and without their knowledge, and, while being so revolved, the plaintiff, being on said turn-table, had his right leg caught near the knee, between the surface of said turn-table and said abutment or wall, and between the iron rail on said turn-table and the iron rail on said abutment or wall, and said leg was thereby so bruised, broken, mangled, and fractured, as to render amputation necessary."

The complaint further alleges that the injury was caused by defendant's negligence, and without any fault or negligence on the part of the plaintiff, or his parents or guardians, etc.

The defendant having answered the complaint, and the action having been called for trial, the defendant moved for judgment on the pleadings. The motion was granted by Hall, J., and judgment entered accordingly, from which plaintiff appealed.

Mead & Thompson, for appellant.

Bigelow, Flandrau & Clark, for respondent, relied on the opinion of Hall, J., and the cases therein cited.¹

YOUNG, J. In the elaborate opinion of the Court below, which formed the basis of the argument for the defendant in this Court, the case is

¹ This opinion, too long to be inserted here, will be found in 2 Cent. Law Journal, 170.

treated as if the plaintiff was a mere trespasser, whose tender years and childish instincts were no excuse for the commission of the trespass, and who had no more right than any other trespasser to require the defendant to exercise care to protect him from receiving injury while upon its turn-table. But we are of opinion that, upon the facts stated in the complaint, the plaintiff occupied a very different position from that of a mere voluntary trespasser upon the defendant's property, and it is therefore unnecessary to consider whether the proposition advanced by the defendant's counsel, viz., that a landowner owes no duty of care to trespassers, is not too broad a statement of a rule which is true in many instances.

To treat the plaintiff as a voluntary trespasser is to ignore the averments of the complaint, that the turn-table, which was situate in a public (by which we understand an open, frequented) place, was, when left unfastened, very attractive, and, when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of whom were in the habit of going upon it to play. The turn-table, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children, following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turn-table by the defendant's own conduct, and that, as to him, the turn-table was a hidden danger, — a trap.

While it is held that a mere licensee "must take the permission with its concomitant conditions, — it may be perils," *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Bolch v. Smith*, 7 H. & N. 836, yet even such licensee has a right to require that the owner of the land shall not knowingly and carelessly put concealed dangers in his way. *Bolch v. Smyth*, per Channell and Wilde, BB.; *Corby v. Hill*, 4 C. B. (N. S.) 556, per Willes, J.

And where one goes upon the land of another, not by mere license, but by invitation from the owner, the latter owes him a larger duty. "The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any inducement, invitation, or allurement, either express or implied, by which they have been led to enter thereon." Per Bigelow, C. J., in *Sweeny v. Old Colony & Newport R. Co.*, 10 Allen, 368, reviewing many cases. And see *Indermaur v. Dames*, L. R. 1 C. P. 274; L. R. 2 C. P. 311.

Now, what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. If the defendant had left this turn-table unfastened for the purpose of attract-

ing young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defence to an action by the plaintiff, who had been attracted upon the turn-table and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. In *Townsend v. Wathen*, 9 East, 277, it was held to be unlawful for a man to tempt even his neighbor's dogs into danger, by setting traps on his own land, baited with strong-scented meat, by which the dogs were allured to come upon his land and into his traps. In that case, Lord Ellenborough asks, "What is the difference between drawing the animal into the trap by his natural instinct, which he cannot resist, and putting him there by manual force?" And Grose, J., says, "A man must not set traps of this dangerous description in a situation to invite his neighbor's dogs, and, as it were, to compel them by their instinct to come into the traps."

It is true that the defendant did not leave the turn-table unfastened, for the purpose of injuring young children; and if the defendant had no reason to believe that the unfastened turn-table was likely to attract and to injure young children, then the defendant would not be bound to use care to protect from injury the children that it had no good reason to suppose were in any danger. But the complaint states that the defendant knew that the turn-table, when left unfastened, was easily revolved; that, when left unfastened, it was very attractive, and when put in motion by them, dangerous, to young children; and knew also that many children were in the habit of going upon it to play. The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurements, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault (for it cannot blame them for not resisting the temptation it has set before them), it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves.

We agree with the defendant's counsel that a railroad company is not required to make its land a safe play-ground for children. It has the same right to maintain and use its turn-table that any landowner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care in any case must, in general, be a question for the jury, upon all the circumstances of the case.

The position we have taken is fully sustained by the following cases, some of which go much farther in imposing upon the owner of dangerous articles the duty of using care to protect from injury children

who may be tempted to play near or meddle with them, than it is necessary to go in this case. *Lynch v. Nurdin*, 1 Q. B. 29; *Birge v. Gardiner*, 19 Conn. 507; *Whirley v. Whiteman*, 1 Head, 610.

It is true that, in the cases cited, the principal question discussed is not whether the defendant owed the plaintiff the duty of care, but whether the defendant was absolved from liability for breach of duty by reason of the fact that the plaintiff was a trespasser, who, by his own act, contributed to the injury; and the distinction is not sharply drawn between the effect of the plaintiff's trespass, as a bar to his right to require care, and the plaintiff's contributory negligence, as a bar to his right to recover for the defendant's failure to exercise such care as it was his duty to use. But as a young child, whom the defendant knowingly tempts to come upon his land, if anything more than a technical trespasser, is led into the commission of the trespass by the defendant himself, and thus occupies a position widely different from that of an ordinary trespasser, the fact that the Courts, in the cases referred to, assumed, instead of proving, that the defendant owed to a young child, under such circumstances, a duty he would not owe to an ordinary trespasser, for whose trespass he was not in any way responsible, does not weaken the authority of those cases. And in *Railroad Co. v. Stout*, 17 Wall. 657 (a case in all respects similar to the present), the distinction insisted on by counsel is taken by Mr. Justice Hunt, and the circumstance that the plaintiff was in some sense a trespasser is held not to exempt the defendant from the duty of care. In the charge of the learned circuit judge at the trial of the last named case (reported under the title of *Stout v. Sioux City & Pacific R. Co.*, 2 Dillon, 294), the elements which must concur to render the defendant liable, in a case like the present, are clearly stated.

In *Hughes v. Macfie*, 2 Hurlst. & Coltm. 744, and *Mangan v. Atterton*, L. R. 1 Exch. 239, cited by defendant's counsel, there was nothing to show that the defendants knew or had reason to apprehend that the cellar lid in the one case, or the crushing machine in the other, would be likely to attract young children into danger. It must be conceded that *Hughes v. Macfie* is not easily to be reconciled with *Birge v. Gardiner*, and that *Mangan v. Atterton* seems to conflict with *Lynch v. Nurdin*; but whether correctly decided or otherwise, they do not necessarily conflict with our decision in this case.

Much reliance is placed by defendant on *Phila. & Reading R. Co. v. Hummell*, 44 Penn. St. 375, and *Gillis v. Penn. R. Co.*, 59 Penn. St. 129. In the first of these cases, the plaintiff, a young child, was injured by coming upon the track while the cars were in motion. The only negligence charged upon the defendant was the omission to give any signal at or after the starting of the train. If the plaintiff had been crossing the track, through one of the openings which the company had suffered the people in the neighborhood to make in the train while standing on the track, and the cars had then been run together upon him, without any warning, the case would more nearly resemble

the present; but the facts, as they appear, show that the company used abundant care, and that it had no reason to suppose that the plaintiff was exposed to danger; and the decision is put upon the latter ground, although Strong, J., delivering the opinion of the Court, uses language which lends some support to the defendant's contention in this case. *Gillis v. Penn. R. Co.* was properly decided, on the ground that the company did nothing to invite the plaintiff upon the platform, by the fall of which he was injured, and that the platform was strong enough to bear the weight of any crowd of people which the company might reasonably expect would come upon it. Neither of these cases is an authority against, while a later case in the same court, *Kay v. Penn. R. Co.*, 65 Penn. St. 269, tends strongly to support, the plaintiff's right of action in this case; and the recent case of *Pittsburg, A. & M. Passenger R. Co. v. Caldwell*, 74 Penn. St. 421, points in the same direction.

It was not urged upon the argument that the plaintiff was guilty of contributory negligence, and we have assumed that the plaintiff exercised, as he was bound to do, such reasonable care as a child of his age and understanding was capable of using, and that there was no negligence on the part of his parents or guardians, contributing to his injury.

Judgment reversed.

SECTION III.

Duty of Care towards Licensee.

HOUNSELL v. SMYTH, ET ALS.

1860. 7 *Common Bench Reports, New Series*, 731.¹

THE declaration alleged, in substance, that defendants were seized of certain waste land, upon which was a quarry situated near to and between two public highways leading over said waste land; that said waste land was wholly unenclosed and open to the public, and that all persons having occasion to cross and pass over the waste land had been accustomed to go upon and across the same without interruption or hindrance from, and with the license and permission of, the owners of the land; that the quarry was dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste land for the purpose of passing from one of said roads to the other of them beside or near the quarry; that defendants, well knowing the premises, negligently and improperly, and contrary to their duty in that behalf, left the quarry wholly unfenced and unguarded, and took no care for guarding the public or any person so accidentally deviating from

¹ Statement abridged. Arguments omitted. — Ed.

the roads, or passing over the waste land, from falling into the quarry; that plaintiff, in the night, having occasion to pass along one of the roads, and having accidentally taken the wrong one, was crossing the waste land for the purpose of getting into the other road, and, not being aware of the existence and locality of the quarry, and being unable by reason of the darkness to perceive the same, fell in and was hurt.

The defendants demurred to the declaration, and also pleaded certain pleas to which the plaintiff demurred.

Karslake, for defendant.

Kingslake, Serjt., for plaintiff.

WILLIAMS, J. [The learned judge first considered whether the declaration would have been sufficient, if it had omitted the allegation, that persons had been accustomed to pass over the land without interruption from, and with the permission of, the owners. He said that the declaration did not allege that the excavation was so near a public road as to constitute a public nuisance; and that the declaration, without the allegation as to the acquiescence or permission of the owners, would clearly have been bad; referring to *Barnes v. Ward*, 9 C. B. 392; *Hardcastle v. South Yorkshire R. Co.*, 4 H. & N. 67; *Blyth v. Topham*, Cro. Jac. 158. He proceeded as follows:—] Then, how is the case altered by the introduction of the allegation, “that all persons having occasion to cross or pass over the said waste land have been used and accustomed to go upon, along, and across the same without interruption or hindrance from, and with the license and permission of, the owners of such waste land?” No right is alleged; it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint,—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils. Suppose the owner of land near the sea gives another leave to walk on the edge of a cliff, surely it would be absurd to contend that such permission cast upon the former the burthen of fencing? Can it make any difference that there is a public highway open to but at some distance from the cliff? A resemblance has been suggested between this case and that of *Corby v. Hill*, 4 C. B. N. s. 556 (E. C. L. R. vol. 93); but there is really no analogy between them. In that case the defendant held out an inducement to persons to come upon the land, by permitting it to be used as the means of access to his house, and therefore he was bound to warn persons so using the road of the obstruction which had been placed there. The principle upon which that case was decided very closely approximates to that which is stated in *Barnes v. Ward*. All that can be said in this case is, that the plaintiff had a tacit permission to cross the waste. It was not the fault of the defendants that he was ignorant of the existence and locality of the quarry, and of the danger he incurred by crossing the same in the dark. Upon the whole, it seems

to me that this case is not distinguishable from *Blyth v. Topham*, and does not fall within the exception established by *Barnes v. Ward*, and acted upon in *Hardcastle v. The South Yorkshire Railway Company*. I therefore think our judgment must be for the defendants.

[KEATING, J., delivered a concurring opinion.]

Judgment for defendants.

REARDON v. THOMPSON.

1889. 149 *Massachusetts*, 267.

HOLMES, J. This is an action for personal injuries caused by the plaintiff's falling into a hole, which was dug, we will assume, by the defendant, and which was nine inches in the defendant's land and extended nine inches into the land of a neighbor, Mrs. Appleton, by her license. The land in question was a strip eight feet wide, running back from Pope Street, in East Boston, between the defendant's house and Mrs. Appleton's. Of this eight feet, nine inches only belonged to the defendant, and seven feet three inches to Mrs. Appleton. The plaintiff was going to another house of the defendant on the rear end of her lot, to which the proper entrance was from the rear. So far as appears, she was on Mrs. Appleton's land at the time of the accident.

The argument for the plaintiff is based on the assumption that she was invited to pass over the eight-foot strip. But there is no evidence that she was invited there either by the defendant or by Mrs. Appleton. The failure, if there was any, to prohibit the use of the strip was not an invitation to use it. *Galligan v. Metacomet Manuf. Co.*, 143 Mass. 527. Neither were the facts that the houses were near together, and that the only approach to the rear house, directly from Pope Street, was over the strip. The defendant's lawful obstruction of her own land was not an invitation to go upon Mrs. Appleton's, and Mrs. Appleton's partial obstruction of her land was not an invitation to persons visiting the defendant's tenants to go upon the unobstructed part. We must assume that there was a lawful passage from the rear house to some street. The defendant was under no obligation to furnish short cuts from every street in the neighborhood. This is not a case like *Toomey v. Sanborn*, 146 Mass. 28, where a third person was held liable for opening a hole in what was conceded to be a private way.

The fair conclusion from the plaintiff's evidence is that she was a trespasser. But if we assume that the jury might have found that there had been such use of the strip and such acquiescence on the part of the owners as to imply a license, still the plaintiff cannot recover. No doubt a bare licensee has some rights. The landowner cannot shoot him. It has been held that an owner would be liable for negligently bringing force to bear upon the licensee's person, as by running him

down without proper warning. *Byrne v. New York Central & Hudson River Railroad*, 104 N. Y. 362; *Taylor v. Delaware & Hudson Canal Co.*, 113 Penn. St. 162, 175. Compare *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66; *Batchelor v. Fortescue*, 11 Q. B. D. 474. It is not necessary to say that no species of pitfall or trap could be conceived for which a landowner would be answerable. *Bolch v. Smith*, 7 H. & N. 736, 747.

But the general rule is, that a licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368, 372; *Zoebis v. Tarbell*, 10 Allen, 385; *Heinlein v. Boston & Providence Railroad*, 147 Mass. 136; *Files v. Boston & Albany Railroad*, ante, 204; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Sullivan v. Waters*, 14 Ir. C. L. 460; *Parker v. Portland Publishing Co.*, 69 Me. 173; *Byrne v. New York Central & Hudson River Railroad*, 104 N. Y. 362, and cases cited.

Exceptions overruled.

W. N. Osgood, for the plaintiff.

J. A. Maxwell, for the defendant.

E. GAUTRET, ADMINISTRATRIX OF LEON GAUTRET v. EGERTON

ET ALS.

L. JONES, ADMINISTRATRIX OF JOHN JONES, v. EGERTON ET ALS.

1867. *Law Reports, 2 Common Pleas*, 371.

THE declaration in the first of these actions stated that the defendants were possessed of a close of land, and of a certain canal and cuttings intersecting the same, and of certain bridges across the said canal and cuttings, communicating with and leading to certain docks of the defendants, which said land and bridges had been and were from time to time used with the consent and permission of the defendants by persons proceeding towards and coming from the said docks; that the defendants, well knowing the premises, wrongfully, negligently, and improperly kept and maintained the said land, canal, cuttings, and bridges, and suffered them to continue and be in so improper a state and condition as to render them dangerous and unsafe for persons lawfully passing along and over the said land and bridges towards the said docks, and using the same as aforesaid; and that Leon Gautret, whilst he was lawfully in and passing and walking along the said close and over the said bridge, and using the same in the manner and for the purpose aforesaid, by and through the said wrongful, negligent, and improper conduct of the defendants as aforesaid, fell into one of the said cuttings

of the defendants, intersecting the said close as aforesaid, and thereby lost his life within twelve calendar months next before the suit: and the plaintiff, as administratrix, for the benefit of herself, the widow of the said Leon Gautret, and A. Gautret, &c., according to the statute in such case made and provided, claimed 2,500*l*.

The defendants demurred to the declaration, on the ground that "it does not appear that there was any legal duty or obligation on the part of the defendants to take means for preventing the said land, &c., being dangerous and unsafe." Joinder.

The declaration in *Jones v. Egerton* was the same as the above, and there was a like demurrer.

Crompton (Mellish, Q. C., with him), in support of the demurrers.—To maintain these actions, the declarations ought to show a *duty* in the defendants to keep the canal, cuttings, and bridges in a safe condition, and also that some invitation had been held out to the deceased to come there, and that the thing complained of constituted a sort of trap. *Seymour v. Maddox*, 16 Q. B. 326 (E. C. L. R. vol. 71), 19 L. J. Q. B. 525; *Corby v. Hill*, 4 C. B. N. s. 556 (E. C. L. R. vol. 93), 27 L. J. C. P. 318. These declarations are entirely wanting in all these particulars. It is not enough to show that the defendants were aware that the place in question was in an unsafe condition, and that the public were in the habit of passing along it. *Hounsell v. Smyth*, 7 C. B. N. s. 731 (E. C. L. R. vol. 97), 29 L. J. C. P. 203.

[WILLES, J. The declaration does not even state that the deceased persons were unacquainted with the state of the place.]

Herschell, for the plaintiff Gautret. — The question raised upon this declaration is, whether there is any duty on the part of the defendants towards persons using their land as the deceased here did. That may be negligence in the case of a license, which would not be negligence as against a mere trespasser: and, if there can be any case in which the law would imply a duty, it is sufficiently alleged here.

[WILLES, J. It may be the duty of the defendants to abstain from doing any act which may be dangerous to persons coming upon the land by their invitation or permission, as in *Indermaur v. Dames*, Law Rep. 1 C. P. 274.¹ So, if I employ one to carry an article which is of a peculiarly dangerous nature, without cautioning him, I may be responsible for any injury he sustains through the absence of such caution. That was the case of *Farrant v. Barnes*, 11 C. B. N. s. 553 (E. C. L. R. vol. 103), 31 L. J. C. P. 137. But, what duty does the law impose upon these defendants to keep their bridges in repair? If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is; if I dig a pit in it, I may be liable for the consequences: but, if I do nothing, I am not.]

It was not necessary to specify the nature of the negligence which is charged: it was enough to allege generally a duty and a breach of it.

¹ Affirmed on appeal, L. R. 2 C. P. p. 311.

Knowing the bridge to be unsafe, it was the duty of the defendants not to permit the public to use it. In *Bolch v. Smith*, 7 H. & N. 736, 31 L. J. Ex. 201, the defect in the fencing of the shaft was apparent: but the judgments of Channell and Wilde, BB., seem to concede that, if there had been a concealed defect, the action would have been maintainable. That shows that there is some duty in such a case as this.

Potter, for the plaintiff Jones, submitted that the implied request on the part of the defendants to persons having occasion to go to the docks to pass by the way in question, raised a duty in them to keep it in a safe condition.

Crompton was not called upon to reply.

WILLES, J. I am of opinion that our judgment must be for the defendants in each of these cases. The argument urged on behalf of the plaintiffs, when analyzed, amounts to this, that we ought to construe the general words of the declaration as describing whatever sort of negligence the plaintiffs can prove at the trial. The authorities, however, and reason and good sense, are the other way. The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover *secundum allegata et probata*. What is it that a declaration of this sort should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others. All that these declarations allege is, that the defendants were possessed of land, and of a canal and cuttings intersecting the same, and of certain bridges across the canal and cuttings communicating with and leading to certain docks of theirs; that they allowed persons going to and from the docks, whether upon the business or for the profit of the defendants or not, to pass over the land; and that the deceased persons, in pursuance of and using that permission, fell into one of the cuttings, and so met their deaths. The consequences of these accidents are sought to be visited upon these defendants, because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants, or as the servants or agents of the defendants; nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers; but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted. That is the whole sum and substance of these declarations. If the docks to which the way in question led were public docks, the way would be a public way, and the township or parish would be bound to repair it, and no such liability as this could be cast upon the defendants merely by reason of the soil of the way being theirs. That is so not only in reason but also upon

authority. It was so held in *Robbins v. Jones*, 15 C. B. n. s. 221 (E. C. L. R. vol. 109), 33 L. J. C. P. 1, where a way having been for a number of years dedicated to the public, we held that the owner of the adjoining house was not responsible for death resulting to a person from the giving way of the pavement, partly in consequence of its being overweighted by a number of persons crowding upon it, and partly from its having been weakened by user. Assuming that these were private docks, the private property of the defendants, and that they permitted persons going to or coming from the docks, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declarations in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shown. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the license. Every man is bound not wilfully to deceive others, or do any act which may place them in danger. It may be, as in *Corby v. Hill*, 4 C. B. n. s. 556 (E. C. L. R. vol. 93), 27 L. J. C. P. 318, that he is responsible if he puts an obstruction on the way which is likely to cause injury to those who by his permission use the way; but I cannot conceive that he could incur any responsibility merely by reason of his allowing the way to be out of repair. For these reasons, I think these declarations disclose no cause of action against the defendants, and that the latter are therefore entitled to judgment.

KEATING, J. I am of the same opinion. It is not denied that a declaration of this sort must show a duty and a breach of that duty. But it is said that these declarations are so framed that it would be necessary for the plaintiffs at the trial to prove a duty. I am, however, utterly unable to discover any duty which the defendants have contracted towards the persons whom the plaintiffs represent, or what particular breach of duty is charged. It is said that the condition of the land and bridges was such as to constitute them a kind of trap. I cannot accede to that. The persons who used the way took it with all its imperfections.

Herschell asked and obtained leave to amend within ten days, on payment of costs; otherwise judgment for the defendants.

Judgment accordingly.

CAMPBELL v. BOYD.

1883. 88 *North Carolina*, 129.

CIVIL ACTION tried at Fall Term, 1882, of Beaufort Superior Court, before Gilliam, J.

The defendant appealed.

Mr. George H. Brown, Jr., for plaintiff.

No counsel for defendant.

SMITH, C. J. The defendant owns and operates a mill, that has been built and used for one hundred years, at the head of Pungo creek. A few yards below its site the creek divides, and its waters flow in two separate streams. Along its course on either side run parallel public roads each two miles distant, and from them have been constructed private ways leading up to and meeting at the mill, and affording convenient access from the roads to it. One of these ways was opened by former proprietors, and the other in the year 1867, by the defendant.

In 1875 or 1876, the defendant, with other owners of the intervening land, united in opening a connecting way, between those leading from the public roads, from near points in each, so as to form a direct pass-way across the two divergent streams from one road to the other, without going up to the mill. Over these waters they also constructed bridges. While this direct route was opened mainly for the convenience of the defendant and his associates, whose lands were traversed, it was also used as well by the public with full knowledge of the defendant, and without objection from any one in passing between the roads.

In February, 1882, the plaintiff, with his horse, while in the use of this connecting way and passing one of the bridges, broke through, and both were precipitated into the creek, and the damage sustained for the redress of which the suit is brought.

The flooring of the bridge was sound, and there was no visible indication of weakness or decay to put a person passing over it on his guard. But the timbers underneath, and hidden by the floor, were in a rotten and unsound condition, and of this the defendant had full knowledge before the disaster.

He was at his mill and saw what occurred, and going up to the place remarked to the plaintiff that when he saw him about to enter the bridge he thought of calling him to stop, but did not do so; that the bridge was unsafe, and he regretted he did not stop the plaintiff from crossing.

These are the material facts found by the judge, under the consent of parties that he should pass upon the evidence and ascertain the facts of the case, and our only inquiry is upon the correctness of his ruling that the defendant is liable in damages to the plaintiff, and from which the defendant appeals.

The only case in our reports bearing upon the point is that of *Mulholland v. Brownrigg*, 2 Hawks, 349. There, the defendant's mill-pond overflowed parts of the public road, and hollow bridges had been erected, but by whom, did not appear; nor was it shown that they were built at the expense of the public. This condition of things had existed for twenty years, and the mill had been owned and operated by the defendant for the space of five years. The successive mill proprietors had kept the overflowed bed of the road and the bridges in repair. The plaintiff's wagon, loaded with goods, passing a bridge, broke through, in consequence of its decayed state, and the goods were injured by the water. The action was for this injury. It was declared by the Court that as a nuisance was created by the flooding of the road, and the defendant had undertaken to remedy it in constructing the bridges, it was his duty, as that of preceding proprietors of the mill, to maintain them in a proper condition of repair, and ensure the safety of those persons who in using the road had to pass over them, and that the damage having resulted from his negligence he was liable to the plaintiff. The proposition is asserted, that inasmuch as the defendant has undertaken to remedy a nuisance of his own creating, by constructing the bridge, he undertakes also and is bound to keep it in sufficient repair, and is answerable for the consequences of his neglect to do so.

The principle of law, in more general terms and with a wider scope, is thus expressed by Hoar, J., in *Combs v. New Bed. Con. Co.*, 102 Mass. 584. "There is another class of cases in which it has been held that, if a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby, to any other person entering upon the premises by his invitation and procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care."

"The principle is well settled," remarks Appleton, C. J., "that a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained, against the individual so inviting, and being in default for the neglect." *Tobin v. P.S. and P. R. R.*, 59 Maine, 188.

Several illustrations of the principle in its different applications will be found in Wharton on Negligence, § 826, and following.

The facts of the present case bring it within the rule thus enunciated. The way was opened by the defendant and his associates; primarily, though it was for his and their accommodation, yet, permissively, to the general travelling public. It has, in fact, been thus used, and known to the defendant to be thus used, with the acquiescence of himself and the others; and under these circumstances it may fairly be assumed to be an invitation to all who have occasion thus to use it; and hence a voluntary obligation is incurred to keep the bridges in a safe condition, so that no detriment may come to travellers.

Reparation is an inseparable incident of its construction, and, as the obligation to repair rests on no other, the liability for neglect must rest on those who put the bridges there and invited the public to use them.

It is true the way might have been closed, or the public prohibited by proper notices from passing over it, and no one could complain of the exercise of the right to do so; but as long as the way is left open and the bridges remain for the public to use, it is incumbent on those who constructed and maintain them to see that they are safe for all.

The law does not tolerate the presence over and along a way in common use, of structures apparently sound, but in fact ruinous, like man-traps, inviting travellers to needless disaster and injury. The duty of reparation should rest on some one, and it can rest on none others but those who built and used the bridges, and impliedly at least invite the public to use them also. For neglect of this duty they must abide the consequences.

We hold, therefore, that there is no error, and the judgment must be affirmed.

No error.

Affirmed.

GALLAGHER v. HUMPHREY.

1862. 6 *Law Times Reports, New Series*, 684; *S. C. 10 Weekly Reporter*, 664.¹

DECLARATION. That the defendant was possessed of a crane fixed upon the New Hibernia Wharf, in a certain passage called Montague Close, Southwark, along which passage the plaintiff and others were permitted to pass, repass, and use the same as a way to certain wharves; that the crane was used by the defendant and his servants to raise and lower goods over the passage; that the plaintiff was, with the permission of the proprietors of the passage, lawfully passing along the said passage to the said wharves; yet the defendant, by himself and his servants, so negligently, &c. managed, directed, and conducted themselves that by and through such neglect, &c., a part of the said crane broke whilst the defendant, by his servants, was using the same, and certain goods fell upon the plaintiff whilst he was passing along, &c. and broke both his legs, &c.

Pleas: 1. Not guilty. 2. That the plaintiff and others were not permitted by the proprietors of the said passage to pass, repass, and use the said passage as a way from a highway to certain wharves, as in the declaration charged. 3. That the plaintiff was not, with the permission of the proprietors of the said passage, lawfully passing along the said passage from the said highway to the said wharves, as in the declaration alleged.

¹ The case is reprinted from the *Law Times Reports*, except the opinions of Crompton, J., and Blackburn, J., which are taken from the *Weekly Reporter*. — Ed.

Issue on the said pleas.

At the trial before Blackburn, J., at the Croydon Summer Assizes, 1861, it was proved that the plaintiff, the son of a laborer employed in the erection of West Kent Wharf, under a contractor for the defendant's father, had, on the day when the accident happened, taken his father's dinner, according to his usual custom, to West Kent Wharf, and on his return was obliged to pass under a crane erected on the defendant's (Hibernia) wharf, and there employed in lowering barrels of sugar. As he was passing the chain broke, and 12 cwt. of sugar fell upon him, inflicting the injuries complained of. The breakage of the chain was caused by negligence in the mode of applying the breaks, for, after the sugar had been attached the chain of the crane was allowed to run, and then the man suddenly put on the break and the jerk caused the weight to rise and fall and the chain to break. Montague Close is approached by steps from London Bridge, the gate to which was usually opened very early in the morning, and numbers of persons, to the knowledge of the defendant, used to pass along the passage, and no objection was made to persons using the way if on legitimate business. The judge left the following questions to the jury: 1st, Was the accident caused by the negligence of the defendant, or was it a pure accident over which no one could have any control? 2d, Could the boy by reasonable care have avoided the accident? 3d, Were the plaintiff and others permitted to go up Montague Close by the owners? 4th, Did the defendant on the evidence as disclosed tacitly give permission to the plaintiff to pass that way? 5th, Was the boy going to the wharf for a legitimate purpose? The jury having answered all the questions in favor of the plaintiff, a verdict was entered for him, with leave for the defendant to move to set it aside and enter a verdict on the second and third issues. The damages were assessed at £100.

A rule *nisi* having been obtained calling on the plaintiff to show cause why the verdict should not be entered for the defendant on the second and third issues, —

Shee, Serjt., (*Grady* with him,) showed cause. On the form of the rule as obtained the plaintiff is clearly entitled to succeed, as there was evidence that the defendant did by his acts tacitly give permission to the boy to pass along the close for a lawful purpose, and the jury have so found. But the plaintiff is also entitled to succeed on the broader ground. In *Corby v. Hill*, 4 C. B. N. s. 556, it was held that the defendant was liable for the negligence of his servant in placing materials in a dangerous position, and without notice, on a private road along which persons were accustomed to pass by leave of the owners; and in *Southcott v. Stanley*, 25 L. J. 339, Ex., a visitor to a person's house was held entitled to recover for injuries caused by opening a glass door which was insecure, and which it was necessary for him to open. (He was then stopped by the Court.)

Petersdorff, Serjt. (*Bridge* with him), in support of the rule. Montague Close was the defendant's private property, and no one had

any right to be there without his express or implied permission. The lowering heavy goods from the warehouses by cranes is a manifestly dangerous business, and persons using the way took upon themselves whatever risks might be incidental to that business. In *Hounsell v. Smyth*, 7 C. B. n. s. 743, where the defendant was held not to be liable for leaving a quarry unfenced on waste land across which the public were allowed to pass, Williams, J., said: "No right is averred, but merely that the owners allowed persons, for diversion or business, to go across the waste without complaint; that is, that they were not so churlish as to interfere with any one who went across. But a person so using the waste has no right to complain of any excavation he may find there; he must accept the permission with its concomitant conditions, and it may be its perils." [BLACKBURN, J. Have you any authority that persons so using the way take upon themselves the negligence of the servants about the place?] In *Bolch v. Smith*, 31 L. J. 201, Ex., where workmen employed in a dockyard were permitted to use a place as a way on which revolving machinery had been erected, it was held that the right so to use the place was only the right not to be treated as a trespasser, and that there was no obligation to fence the machinery, and no liability for insufficiently fencing it. [COCKBURN, C. J. There was the ordinary state of things in that case, and no superadded negligence.]

COCKBURN, C. J. I doubt whether on the pleadings and this rule it is competent to enter into the question of negligence, and whether the whole matter does not turn upon the question whether permission was or was not given to the plaintiff to pass along the way. But I should be sorry to decide this case upon that narrow ground. I quite agree that a person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger. The way in question was a private one leading to different wharves. On part of the way a wharf was being constructed or repaired, and the plaintiff's father was employed upon that work. It was the father's habit not to go home to his meals, and the boy used to take them to him at the wharf, and on this occasion was passing along carrying his father's dinner. The plaintiff was therefore passing along on a perfectly legitimate

purpose, and the evidence is that the defendant permitted the way to be used by persons having legitimate business upon the premises. That being so, the defendant places himself by such permission under the obligation of not doing anything by himself or his servants from which injury may arise, and if by any act of negligence on the part of himself or his servants injury does arise, he is liable to an action. That is the whole question. The plaintiff is passing along the passage by permission of the defendant, and though he could only enjoy that permission under certain contingencies, yet when injury arises not from any of those contingencies, but from the superadded negligence of the defendant, the defendant is liable for that negligence as much as if it had been upon a public highway.

WIGHTMAN, J. The rule in this case was obtained on a very narrow ground. The declaration having alleged that the plaintiff and others were permitted to pass, re-pass, and use the way in question, and that the plaintiff was there with the permission of the proprietors of the passage lawfully passing along the passage, the defendant took issue on the fact whether such right to pass along the passage was permitted by the defendant. I think that there was evidence to show that the plaintiff had the permission of the defendant to use the way, and that he was lawfully there at the time of the accident. I entirely agree with my Lord Chief Justice that the plaintiff is also entitled to succeed on the larger ground. It appears to me that such a permission as is here alleged may be subject to the qualification that the person giving it shall not be liable for injuries to persons using the way arising from the ordinary state of things, or of the ordinary nature of the business carried on; but that is distinguishable from the case of injuries wholly arising from the negligence of that person's servants.

CROMPTON, J. I am of the same opinion. I think we should look not only to the grounds upon which this rule was granted, but to the real defence set up by my brother Petersdorff. That defence is, in effect, that the plaintiff was using the way only under the qualified permission that he should be subject to any negligence of the plaintiff or his servants. If that defence be sustainable upon the general issue, or otherwise, we should see whether it is made out, and I am of opinion that it is not made out. I quite agree with what has fallen from my Lord and my brother Wightman. There may be a public dedication of a way, or a private permission to use it subject to a qualification; for example, subject to the danger arising from a stone step or a projecting house; and in such a case the public, or the persons using the way, take the right to use it subject to such qualification; but they are not thereby to be made subject to risks from what may be called active negligence. Whenever a party has a right to pass over certain ground, if injury occurs to him while so passing from negligence, he has a right to compensation. The argument of my brother Petersdorff fails therefore upon this ground. I think, too, that it is doubtful whether even the fact that the injured person was present unlawfully would excuse

negligence, though it would be an element in determining what is negligence, and what is not. In the present case, however, that question does not arise, as there is no doubt the plaintiff was there upon a legitimate errand.

BLACKBURN, J. I am of the same opinion. If the substantial defence raised existed I am not sure but what it could be raised under the present pleadings, and the leave reserved; but at any rate I think we could amend the pleadings, if necessary, to raise it. But I do not think that any such defence exists here. The plaintiff seeks to recover for the negligence of the defendant. Now, the existence of negligence depends upon the duty of the party charged with it. I concur with the judgment of the Court of Exchequer in *Bolch v. Smith* that, when permission is given to a person to pass through a yard where dangerous machinery is at work, no duty is cast upon the person giving such permission to fence the machinery against the person permitted so to pass. That decision does not touch the present case, which falls rather within the remark then made by my brother Wilde: "If persons in the condition of the defendant had left anything like a trap in route used on the premises, I am far from saying they would not be liable." This is more like the case of *Corby v. Hill*, where the matter placed upon the road is called a trap set for persons using it; and it is clear that when one gives another permission to pass over his land, it is his duty not to set a trap for him. Here the boy was passing upon a legitimate errand while the defendant's servants were employed in lowering weights. If he had sustained any injury by a weight descending, without any negligence of the defendant's servants, there is no doubt that he could not recover, but he suffered through the negligence of the persons lowering the bags, who were well aware that people were in the habit of passing below, and that danger would arise if the chain broke. I think, therefore, that it was the duty of the defendant and his servants to use ordinary care that the chain should not break. The jury have found that they neglected that duty, and I do not disagree with their finding. Our decision does not conflict with the judgment of the Court of Exchequer in *Bolch v. Smith*, or of the Common Pleas in *Hounsell v. Smyth*.

Rule discharged.

PLUMMER v. DILL.

1892. *Supreme Court of Massachusetts.* 31 *Northeastern Reporter*, 128.

EXCEPTIONS from Superior Court, Suffolk County, Caleb Blodgett, Judge.

Action by Eva V. Plummer against Charles H. Dill to recover damages for injuries sustained while leaving defendant's building. Judgment for defendant. Plaintiff brings exceptions. Affirmed.

Bartlett & Anderson, for plaintiff.

Ball & Tower, for defendant.

KNOWLTON, J. If we assume that it was the duty of the defendant, to keep the entrance, stairway, and halls of his building reasonably safe for persons using them on an invitation, express or implied, and if we further assume that he negligently permitted them to be unsafe, and that his negligence caused the injury to the plaintiff, and that she was in the exercise of due care, some of which propositions are at least questionable; we come to the inquiry whether the plaintiff was a mere licensee in the building, or was there by the defendant's implied invitation. She did not go there to transact with any occupant of the building any kind of business in which he was engaged, or in the transaction of which the building was used or designed to be used. She was in search of a servant, and, for her own convenience, she went there to inquire about a matter which concerned herself alone. It has often been held that the owner of land or a building, who has it in charge, is bound to be careful and diligent in keeping it safe for those who come there by his invitation, express or implied, but that he owes no such duty to those who come there for their own convenience, or as mere licensees. *Sweeney v. Railroad Co.*, 10 Allen, 368; *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. Rep. 978; *Metcalf v. Steamship Co.*, 147 Mass. 66, 16 N. E. Rep. 701. One who puts a building or a part of a building to use in a business, and fits it up so as to show the use to which it is adapted, impliedly invites all persons to come there whose coming is naturally incident to the prosecution of the business. If the place is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. The mere fact that premises are fitted conveniently for use by the owner or his tenants, and by those who come to transact such business as is carried on there, does not constitute an implied invitation to strangers to come and use the place for purposes of their own. To such persons it gives no more than an implied license to come for any proper purpose. It is held in England that one who comes on an express invitation to enjoy hospitality as a guest must take the house as he finds it, and that his right to recover for an injury growing out of dangers on the premises is no greater than that of a mere licensee. *Southcote v. Stanley*, 1 Hurl. & N. 246. The principle of the decision seems to be that a guest who is receiving the gratuitous favors of another has no such relation to him as to create a duty to make safer or better than it happens to be the place where hospitality is tendered. It is well settled there that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant. *Poll. Torts*, 417; *Holmes v. Railroad Co.*, L. R. 4 Exch. 254, L. R. 6 Exch. 123; *White v. France*, 2 C. P. Div. 308; *Burchell v. Hickis-*

son, 50 Law J. Q. B. 101. The rule in regard to an implied invitation to places of business is held with equal strictness in New York. In *Larmore v. Iron Co.*, 101 N. Y. 391, 4 N. E. Rep. 752, it was decided that a person who entered on the defendant's premises to see if the defendant would give him employment was a mere licensee, and that the defendant was not liable to him for an injury caused by the unsafe condition of the place. The diligence of counsel, and an extended examination of the authorities, have failed to bring to our attention any case in which the owner or occupant of a place fitted up for ordinary use in business has been held, by the condition of his premises, impliedly to invite persons to come there for a purpose in which the occupant had no interest, and which had no connection with the business actually or apparently carried on there. Precisely how far, under all circumstances, an implied invitation extends, in reference to the persons included in it, has not been the subject of very full consideration in this Commonwealth, and is hardly capable of exact statement. But in many cases there is language indicating that the invitation extends only to those who come on business connected with that carried on at the place, and for the transaction of which the place is apparently intended. In *Severy v. Nickerson*, 120 Mass. 306, Mr. Justice Devens says: "There is no duty imposed upon an owner or occupant of premises to keep them in a suitable condition for those who come there for their own convenience merely, without any invitation, either express, or which may fairly be implied from the preparation and adaptation of the premises for the purposes for which they are appropriated." In *Marwedel v. Cook*, 154 Mass. —, 28 N. E. Rep. 140, we find this language: "The general duty which the defendant owed to third persons in respect to the passages of the building is well expressed in the instructions to the jury at the trial: 'That if the defendants leased rooms in the building to different tenants, reserving to themselves the control of the halls, stairways, and elevator, by and through which access was had to these rooms, and the general lighting arrangement of those passages, then the defendants were bound to take reasonable care that such approaches were safe and suitable at all times, and for all persons who were lawfully using the premises, and using due care, so far as they ought to have reasonably anticipated such use as involved in, and necessarily arising out of, the purposes and business for which said rooms were leased.'" In *Learoyd v. Godfrey*, 138 Mass. 323, the plaintiff, a police officer, was expressly invited to the premises by a daughter of the occupant, to arrest an intoxicated person who was making disturbance in the house. In *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. Rep. 421, no question was considered or clearly raised about the invitation to the plaintiff. In *Davis v. Congregational Society*, 129 Mass. 367, the plaintiff went to the defendant's church under an express invitation authorized by the defendant, and the object of her visit was among those contemplated by the defendant when the building was erected. The language used in the cases in this Commonwealth and

in other States indicates that the rule in regard to the extent of the invitation implied from the preparation of property for use in business is the same here as laid down in the cases above cited from the Courts of New York and England. *Sweeny v. Railroad Co.*, 10 Allen, 368; *Elliott v. Pray*, 10 Allen, 378; *Carleton v. Steel Co.*, 99 Mass. 216; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. Rep. 421; *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. Rep. 978; *Heinlein v. Railroad Co.*, 147 Mass. 136, 16 N. E. Rep. 698; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. Rep. 369; *Stevens v. Nichols*, 29 N. E. Rep. 1150, (Suffolk, Feb. 1892); *Metcalfe v. Steamship Co.*, 147 Mass. 66, 16 N. E. Rep. 701; *Parker v. Publishing Co.*, 69 Me. 173; *Campbell v. Sugar Co.*, 62 Me. 552. In *Low v. Railway Co.*, 72 Me. 313, it was held that the owner of a wharf was liable to a custom-house officer, who was upon it, in the performance of his duty to prevent smuggling in the night-time, for an injury resulting from a defective condition of the wharf. The officer was there to prevent unlawful conduct in connection with the business carried on at the wharf, with the consent of the owner; and the owner might fairly be supposed to anticipate and desire and impliedly to invite his presence there to protect the defendant's property from those who would unlawfully use it. Neither the decision nor the cases cited in the opinion, when carefully examined, will be found to give any countenance to the view that one who visits a building for a purpose not connected with the use for which the building was fitted, or to which it is put, is impliedly invited to come there.

There is a class of cases, to which *Sweeny v. Railroad Co.*, *ubi supra*, and *Holmes v. Drew*, 151 Mass. 578, 25 N. E. Rep. 22, belong, which stand on a ground peculiar to themselves. They are where the defendant, by his conduct, has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The inducement or implied invitation in these cases is not to come to a place of business fitted up by the defendant for traffic to which those only are invited who will come to do business with the occupant, nor is it to come by permission or favor or license; but it is to come as one of the public, and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability of such a case should be co-extensive with the inducement or implied invitation. Decisions of the same kind have been made in New York and New Jersey, which are clearly distinguishable — and which have been distinguished on, perhaps, not very satisfactory grounds — from implied invitations growing out of the preparation of one's place of business for use by his patrons. *Barry v. Railroad Co.*, 92 N. Y. 289; *Vanderbeck v. Hendry*, 34 N. J. Law, 467, 471.

On the facts of the case before us, as we are of opinion that the plaintiff was a mere licensee in the defendant's building, and that the rulings at the trial were correct,

Exceptions overruled.

SECTION IV.

Duty of Care towards Invited Person.

INDERMAUR v. DAMES.

1866. *Law Reports*, 1 *Common Pleas*, 274.¹

THIS was an action brought by the plaintiff to recover damages for an injury which he had sustained through the alleged negligence of the defendant and his servants.

The declaration stated, that the defendant was possessed of a high building, containing several floors, used by the defendant as a sugar-refinery, in the interior of which was a shaft or shoot passing from the basement of the building upwards through the several floors thereof, and which said shaft or shoot was highly dangerous to persons entering the said building who might be unacquainted with the same, as the defendant then well knew; and that the plaintiff, then being unacquainted with the said premises, was employed by the defendant to enter the said building and execute certain work in his trade of a gas-fitter, after darkness had set in in the evening, for the defendant, upon one of the upper floors of the said building; yet that the defendant, wrongfully, negligently, and improperly allowed the said shaft or shoot to remain and be open, unfenced, and unguarded, and unlighted, whilst the plaintiff was executing the said work, whereby the plaintiff whilst so employed as aforesaid, fell down the said shaft or shoot, and was precipitated through the same to the basement of the said building, and was greatly hurt, &c.

Pleas, — 1. Not guilty. 2. That there was no such shaft or shoot, as alleged. 3. That the said shaft or shoot was not dangerous, as alleged. 4. That the defendant had no such knowledge of the said danger, as alleged. 5. That the plaintiff was not employed by the defendant, as alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in Middlesex after last Michaelmas Term. The facts were as follows: The plaintiff, who was a journeyman gas-fitter, was at the time of the accident hereinafter mentioned in the employ of one Duckham, a gas-engineer and fitter, who was the patentee of an improved self-acting gas-regulator. The defendant is a sugar-refiner having extensive premises in White-chapel. In June, 1864, Duckham, through one Hargreaves, his agent, agreed with the defendant, who was necessarily a large consumer of gas, to fit up on his premises two of his regulators, upon the terms mentioned in the following memorandum: —

“I hereby agree to attach two of my patent self-acting gas-regulators to your meter in area; and, should I fail to effect a saving of from 15

¹ Arguments omitted. — ED.

to 30 per cent. on your previous consumption, I will remove the regulators, and restore the fittings at my own expense. Should I effect such saving, the machines will be considered, after test, as purchased, and a three years' guarantee given with them. The price to be (two 2-inch) 18*l*."

On Saturday, the 25th of June, Hargreaves went to the defendant's premises, pursuant to appointment, for the purpose of fixing the apparatus. He was accompanied by the plaintiff and another workman in Duckham's employ, named Bristow, and a lad. The plaintiff, however, not being upon that occasion quite sober, Mr. Woods, the defendant's manager, would not allow him to go upon the premises, and the regulators were fixed by Bristow, assisted by the lad, and the work was duly completed. In order to test the regulators, and ascertain that they answered the warranty as to saving in the consumption of gas, it was necessary for the workmen of the patentee to inspect every burner on the premises, to see that they were in a proper state. Bristow having had to do the work almost single-handed, it was too late to make the required inspection on the Saturday night; and accordingly Hargreaves went to the premises on the following Tuesday, accompanied by the plaintiff, in order to examine the several burners and so test the apparatus. Before going there for that purpose, Hargreaves cautioned the plaintiff, saying, "Now, mind, Indermaur, sugar-houses are very peculiar places: they neither allow candles nor lucifers. We must keep our eyes open. There is a man to go with us with a light. I shall follow the man; and you keep close to me." When they arrived at the premises, Hargreaves and the plaintiff, accompanied by one of the defendant's workmen with a light, proceeded to the first floor, and, after examining one of the burners, went round to another part of the floor for the purpose of inspecting another. In the mean time, the plaintiff, who had left a pair of plyers at the spot they first went to, turned back to fetch them; but, in returning, instead of going round the way Hargreaves and the defendant's man had gone, he walked straight across towards them, not perceiving an intervening hole in the floor, and fell through to the floor below, a depth of about thirty feet, and fractured his spine.

The hole in question was a shaft or shoot four feet three inches square, communicating from the basement to the several floors of the building. It was fenced at each side, but open back and front. It was necessary to the defendant's business to have such a shaft; and it was necessary that it should, whilst in use for the raising or lowering of goods, and occasionally also for purposes of ventilation, be open and unfenced; and there was no evidence to show that it was usual in buildings of the kind to adopt the precaution of fencing such shafts.

On the part of the defendant it was submitted that there was no duty or obligation on him to fence the shaft, and consequently no cause of action; and reliance was placed upon *Wilkinson v. Fairrie*, 1 H. & C. 633, 32 L. J. (Ex.) 73.

His lordship observed that, though as to persons employed in the business there might be no duty or obligation to fence, a very different degree of care might be due in the case of a person not so employed, but merely going there for a temporary lawful purpose, as this plaintiff did. He, however, reserved the point.

Several witnesses were then called on the part of the defendant; amongst others, Mr. Woods, the defendant's manager, who stated that the defendant's premises (which had been recently erected) were constructed in the same way as all sugar-refineries were constructed, and were not more than ordinarily dangerous; and that, if he had known that the plaintiff was coming to work upon the premises, he would not have allowed him to do so.

The evidence as to the number of lights on the floor at the time of the accident was conflicting. The plaintiff swore that there were only two; the defendant's witnesses that there were five, and that the light was ample.

In his summing up, the Lord Chief Justice stated in substance as follows: The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person [permanently] employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business. And, after observing upon the facts, he told the jury, that if they found that there was no negligence on the part of the defendant, or that there was want of reasonable care on the part of the defendant, but that there was also want of reasonable care on the part of the plaintiff which materially contributed to the accident, the plaintiff was not entitled to recover; but that, if there was want of reasonable care in the defendant, and no want of reasonable care in the plaintiff, then the plaintiff was entitled to a verdict.

The jury returned a verdict for the plaintiff, damages 400*l*.

Huddleston, Q. C., in Hilary Term, obtained a rule *nisi* to enter a nonsuit, on the ground that the evidence did not disclose any cause of action; or to arrest the judgment, on the ground that the declaration showed no breach of contract or breach of duty on the part of the defendant; or for a new trial, on the ground that the verdict was against the weight of evidence.

Ballantine, Serjt., and *Raymond*, showed cause.

Huddleston, Q. C., and *Griffiths*, in support of the rule.

Curia advisare vult.

Feb. 26. The judgment of the Court (ERLE, C. J., WILLES, KEATING, and MONTAGUE SMITH, JJ.) was delivered by

WILLES, J. This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice at the sittings here after Michaelmas Term, the plaintiff had a verdict for 400*l.* damages, subject to leave reserved.

A rule was obtained by the defendant in last term to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence.

The rule was argued during the last term, before Erle, C. J., Keating and Montague Smith, JJ., and myself, when we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then without injury to the business have been fenced by a rail. Whether it was usual to fence similar shafts when not in use did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use, and it was open and unfenced.

The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving: and, for the purpose of ascertaining whether such a saving had been effected, the plaintiff's employer required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued, that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident: but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman:

and the employment, and the implied authority resulting therefrom to test the apparatus were not of a character involving personal preference (*dilectus personæ*), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the color of ingratitude, so long as there is no design to injure him: see *Hounsell v. Smyth*, 7 C. B. N. s. 371 (E. C. L. R. vol. 97), 29 L. J. (C. P.) 203.

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test; whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety, seems equally to exist during the accessory employment of testing: and any duty to provide for the safety of the master workman, seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable, that, in the case of *Southcote v. Stanley*, 1 H. & N. 247, 25 L. J. (Ex.) 339, upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair which the host was only negligent in not finding out or anticipating the consequence of.

There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver. *Macarthy v. Younge*, 6 H. & N. 329, 30 L. J. (Ex.) 227. The case of the carboy of vitriol¹ was one in which this Court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and, who as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and

¹ *Farrant v. Barnes*, 11 C. B. N. s. 553 (E. C. L. R. vol. 103); 31 L. J. (C. P.) 137.

persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in *Seymour v. Maddox*, 16 Q. B. 326 (E. C. L. R. vol. 71), also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants, not however including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury, are held to be only elements in determining whether there has been contributory negligence: how far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in *Clarke v. Holmes*, 7 H. & N. 937, 31 L. J. (Ex.) 356.¹

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted: *Lancaster Canal Company v. Parnaby*, 11 Ad. & E. 223 (E. C. L. R. vol. 39), 3 P. & D. 162; *per cur.* *Chapman v. Rothwell*, E. B. & E. 168 (E. C. L. R. vol. 96), 27 L. J. (Q. B.) 315, where *Southcote v. Stanley*, 1 H. & N. 247, 25 L. J. (Ex.) 339, was cited, and the Lord Chief Justice, then Erle, J., said: "The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and

¹ And see *Bolch v. Smith*, 7 H. & N. 736; 31 L. J. (Ex.) 201.

as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *Wilkinson v. Fairrie*, 1 H. & C. 633, 32 L. J. (Ex.) 73, relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case; first, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved, that, when the shaft was not in use, a fence might be resorted to without inconvenience; and no usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it: and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be that the guide, knowing the place, ought rather to have waited for him ; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect of which the jury were properly directed ; and, as every reservation of leave to enter a nonsuit carries with it an implied condition that the Court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved, — in effect, that the defendant was the occupier of and carried on business at the place ; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know ; that the plaintiff, by invitation and permission of the defendant, was near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, &c., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers.

As to the motion to arrest the judgment, for the reasons already given, and upon condition that an amendment is to be made if and when required by the defendant, it will follow the fate of the motion to enter a nonsuit.

The other arguments for the defendant, to which we have not particularly adverted, were no more than objections to the verdict as being against the evidence : but it would be wrong to grant a new trial without a reasonable expectation that another jury might take a different view of the facts ; and, as the Lord Chief Justice does not express any dissatisfaction with the verdict, the rule upon this, the only remaining ground, must also be discharged.

Rule discharged.

Affirmed in Exchequer Chamber, L. R. 2 C. P. 311.

SOUTHCOTE v. STANLEY.

1856. 1 *Hurlstone & Norman*, 247.

THE declaration stated that at the time of the committing of the grievances, &c., the defendant was possessed of an hotel, into which he had then permitted and invited the plaintiff to come as a visitor of the defendant, and in which the plaintiff as such visitor then lawfully was by the permission and invitation of the defendant, and in which hotel there then was a glass door of the defendant which it was then necessary for the plaintiff, as such visitor, to open for the purpose of leaving

the hotel, and which the plaintiff, as such visitor, then by the permission of the defendant and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened; nevertheless, by and through the mere carelessness, negligence, and default of the defendant in that behalf, the said door was then in an insecure and dangerous condition, and unfit to be used or opened, and by reason of the said door being in such insecure and dangerous condition and unfit, as aforesaid, and of the then carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass from the said door fell out of the same to and upon the plaintiff, and wounded him, and he sustained divers bodily injuries, and remained ill and unable to work for a long time, &c.

Demurrer and joinder therein.

Raymond, in support of the demurrer. The declaration discloses no cause of action. It is not stated that the plaintiff was in the hotel as a guest, but merely as a visitor; and there is no allegation that the defendant knew of the dangerous condition of the door. To render the defendant liable, the declaration ought to have shown some contract between the plaintiff and the defendant which imposed on the latter the obligation of taking care that the door was secure; or it should have alleged some negligence on the part of the defendant in the performance of a duty which he owed to the plaintiff. [BRAMWELL, B. If a person invites another into his house, and the latter can only enter through a particular door, is it not the duty of the former to take care that the door is in a secure condition?] He may not be aware that the door is insecure. This declaration only alleges that through the carelessness, negligence, and default of the defendant the door was in a dangerous condition; that cannot be read as involving the allegation that the defendant knew that the door was insecure. All facts necessary to raise a legal liability must be strictly averred. *Metcalf v. Hetherington*, 11 Exch. 257. [ALDERSON, B. It is not stated that it was the duty of the defendant, as an hotel keeper, to take care that the door was secure. Suppose a person invites another to his house, and the latter runs his hand through a pane of glass, how is the former liable?] The Court then called on

Gray, contra. The declaration shows a duty on the part of the defendant, and a breach of that duty. It is immaterial whether the injury takes place in a private house, or in a shop, or in a street; the only question is whether the person who complains was lawfully there? The case is similar in principle to that of *Randleson v. Murray*, 8 A. & E. 109; E. C. L. R. vol. 35, which decided that a warehouseman who lowers goods from his warehouse is bound to use proper tackle for that purpose. [ALDERSON, B. It is the duty of every person who hangs anything over a public way to take care that it is suspended by a proper rope.] Whether it be a private house or a shop, a duty is so far imposed on the occupier to keep it reasonably secure, that if a per-

son lawfully enters, and through the negligence of the occupier in leaving it in an insecure state receives an injury, the occupier is responsible. Here it is alleged that the defendant invited the plaintiff to come into the hotel as a visitor; that shows that he was lawfully there. [POLLOCK, C. B. The position that an action lies because the plaintiff was lawfully in the house, cannot be supported; a servant is lawfully in his master's house and yet if the balusters fell, whereby he was injured, he could not maintain an action against the master. If a lady who is invited to dinner goes in an expensive dress, and a servant spills something over her dress which spoils it, the master of the house would not be liable. Where a person enters a house by invitation the same rule prevails as in the case of a servant. A visitor would have no right of action for being put in a damp bed, or near a broken pane of glass, whereby he caught cold. ALDERSON, B. The case of a shop is different, because a shop is open to the public; and there is a distinction between persons who come on business and those who come by invitation.]

POLLOCK, C. B. We are all of opinion that the declaration cannot be supported, and that the defendant is entitled to judgment. I do not think it necessary to point out the reasons by which I have come to that conclusion; because it follows from the decision of this Court¹ that the mere relation of master and servant does not create any implied duty on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. That decision has been followed by several cases,² and is now established law, though I believe the principle was not recognized until recent times. The reason for the rule is that the servant undertakes to run all the ordinary risk of service, including those arising from the negligence of his fellow-servants. The rule applies to all the members of a domestic establishment, so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow-servant; neither can one servant maintain an action against another for negligence whilst engaged in their common employment. The same principle applies to the case of a visitor at a house: whilst he remains there he is in the same position as any other member of the establishment, so far as regards the negligence of the master or his servants, and he must take his chance with the rest.

ALDERSON, B. I am of the same opinion.

BRAMWELL, B. I agree with Mr. *Gray* to this extent, that where a person is in the house of another, either on business or for any other purpose, he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance, that he will not allow a trap-door to be open through which the visitor may fall. But in this case my difficulty is to see that the declaration charges any

¹ *Priestly v. Fowler*, 3 M. & W. 1.

² See *Hutchinson v. The Newcastle, York, & Berwick Railway Company*, 5 Exch. 343; *Wiggett v. Fox*, 11 Exch. 832.

act of commission. If a person asked another to walk in his garden, in which he had placed spring-guns or men-traps, and the latter, not being aware of it, was thereby injured, that would be an act of commission. But if a person asked a visitor to sleep at his house, and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply an act of omission. This declaration merely alleges that "by and through the mere carelessness, negligence, default, and improper conduct of the defendant," the glass fell from the door. That means a want of care, — a default in not doing something. The words are all negatives, and under these circumstances the action is not maintainable. I doubted whether the words "carelessness, negligence, and improper conduct," &c., might not mean something equivalent to actual commission, but on the best consideration which I can give the subject, it appears to me that they do not mean that, but merely point to a negative. If I misconstrue the declaration it is the fault of those who so framed it.

Judgment for the defendant.

DAVIS v. CENTRAL CONGREGATIONAL SOCIETY.

1880. 129 *Massachusetts*, 367.¹

TORT for personal injuries, occasioned by a fall while passing from defendant's house of worship to the street. In the Superior Court a verdict was directed for the defendant.

H. C. Holt, for plaintiff.

C. G. Keyes, for defendant.

COLT, J. To maintain this action, it must be shown that the defendant corporation was chargeable with some neglect of duty which it owed to the plaintiff, by reason of which she suffered the injury complained of. The injury was caused by falling over a wall by the side of a passage-way leading from the street to the front entrance of the defendant's church edifice. It is alleged that this way was dangerous because of the failure of the defendant to provide by railing or other suitable protection against such an accident.

The owner or occupier of real estate is under no obligation to keep the premises safe for those who enter without inducement or invitation, express or implied, and the plaintiff must show that at the time of the injury she was passing over the way in question by the invitation of the defendant, and not by mere license or permission. The fact that the plaintiff was induced by the defendant to enter upon a dangerous place without warning, is the negligence which entitles the plaintiff to

¹ The statement of facts by the reporter has been omitted.—ED.

recover. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Severy v. Nickerson*, 120 Mass. 306.

The first question in the case is whether there was any evidence, which should have been submitted to the jury, that the plaintiff was induced by the express or implied invitation of the defendant to enter upon the premises.

It appears that the plaintiff attended in the evening a religious meeting in the defendant's house of worship, and on leaving, at its close, was injured in passing from the same to the street. The meeting which she attended was the meeting of a conference of congregational churches in the vicinity of Boston, which included the church connected with the defendant society, and also the church in Brighton of which the plaintiff was a member. This conference is an organization distinct from the religious societies of which it is composed, and its periodical meetings are held in the houses of worship of the different churches by turn. There was evidence that the meeting which the plaintiff attended was held in the defendant's church by the permission of the pastor, approved or ratified by the officers of the church and society, who had the care and custody of the building, and the right to grant the use of it for religious services of this description. It also appears that, in accordance with the usages of the conference, notices were sent to the several churches, containing a general invitation to all the members of the same to attend this meeting, and that one of these invitations was read from the pulpit of the church in Brighton on the Sunday before.

This evidence would clearly justify a jury in finding that the plaintiff came by the defendant's invitation. The authority given by the defendant to the conference to hold its meeting in this place implied an authority to secure an attendance by invitations given in the known and usual manner, and it is unnecessary to inquire whether the construction of this passage-way, thus obviously left open to the free use of all who might desire to attend religious service in the church, would not in itself imply such an invitation as would impose on the defendant the duty of making it reasonably safe to those who in the exercise of due care might use it.

The application of the rules on which the defendant's liability depends is not affected by the consideration that this is a religious society, and that the plaintiff came solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that the plaintiff comes by invitation is enough to impose on the defendant the duty which lies at the foundation of this liability; and that too, although the defendant in giving the invitation was actuated only by motives of friendship and Christian charity. In *Sweeny v. Old Colony & Newport Railroad*, above cited, the defendant was held liable, because the

plaintiff was induced to enter upon a private crossing over the railroad, although he had no business with the corporation, and simply attempted to cross for his own convenience. And this defendant, as an incorporated religious society and as owner and occupier of the premises in question, is subject to all the duties and liabilities which are incident to the ownership and possession of real estate.

On the question whether the defendant was chargeable with neglect of duty in not providing a reasonably safe way to and from the church, we cannot say, as matter of law, that the construction, location, and direction of the way, with the wall and declivity by its side, the want of a proper railing, and the insufficiency of light, would not justify a finding that in the night-time it was unsafe for the use of a person exercising ordinary care and prudence. Nor can we say that the evidence shows conclusively that the plaintiff was not in the exercise of due care. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137. But the fact that this Court considers the case as one proper to be submitted to the jury on these points is not to be taken as an indication of an opinion that the finding should be for the plaintiff. It is not a question here of the preponderance of evidence; and it is often the duty of the Court to submit a question of fact to the jury, on the plaintiff's request, when the weight of evidence may appear to be against him.

New trial ordered.

SWEENEY v. OLD COLONY, &C. RAILROAD COMPANY.

1865. 10 *Allen (Massachusetts)*, 368.

TORT to recover damages for a personal injury sustained by being run over by the defendants' cars, while the plaintiff was crossing their railroad by license, on a private way leading from South Street to Federal Street, in Boston.

At the trial in this Court, before Chapman, J., it appeared that this private-way, which is called Lehigh Street, was made by the South Cove Corporation for their own benefit, and that they own the fee of it; that it is wrought as a way, and buildings are erected on each side of it, belonging to the owners of the way, and there has been much crossing there by the public for several years. The defendants, having rightfully taken the land under their charter, not subject to any right of way, made a convenient plank-crossing and kept a flagman at the end of it on South Street, partly to protect their own property, and partly to protect the public. They have never made any objection to such crossing, so far as it did not interfere with their cars and engines. There are several tracks at the crossing. The only right of the public to use the crossing is under the license implied by the facts stated above.

On the day of the accident, the defendants had a car at their depot which they had occasion to run over to their car-house. It was attached to an engine and taken over the crossing, and to a proper distance beyond the switch. The coupling-pin was then taken out, the engine reversed, and it was moved towards the car-house by the side track. The engine was provided with a good engineer and fireman, and the car with a brakeman; the bell was constantly rung, and the defendants were not guilty of any negligence in respect to the management of the car or engine.

As the engine and car were coming from the depot, the plaintiff, with a horse and a wagon loaded with empty beer-barrels, was coming down South Street from the same direction. There was evidence tending to show that, as he approached the crossing, the flagman, who was at his post, made a signal to him with his flag to stop, which he did; that, in answer to an inquiry by the plaintiff whether he could then cross, he then made another signal with his flag, indicating that it was safe to cross; that the plaintiff started and attempted to cross, looking straight forward; that he saw the car coming near him as it went towards the car-house; and that he jumped forward from his wagon, and the car knocked him down and ran over him and broke both his legs. It struck the fore-wheel of his wagon and also his horse. If he had remained in his wagon, or had not jumped forwards, or had kept about the middle of the crossing, the evidence showed that he would not have been injured personally. His wagon was near the left-hand side of the plank-crossing as he went.

The defendants contended that, even if the plaintiff used ordinary care, and if the flagman carelessly and negligently gave the signal that he might cross, when in fact it was unsafe to do so on account of the approaching car, the plaintiff was not entitled to recover, because the license to people to use the crossing was not a license to use it at the risk of the defendants, but to use it as they best could when not forbidden, taking care of their own safety, and going at their own risk; and also, that if the flagman made a signal to the plaintiff that he might cross, he exceeded his authority.

But the evidence being very contradictory as to the care used by the plaintiff, and also as to the care used by the flagman, the judge ruled, for the purpose of taking a verdict upon these two facts, that the defendants had a right to use the crossing as they did on this occasion, and that they were not bound to keep a flagman there; yet, since they did habitually keep one there, they would be responsible to the plaintiff for the injury done to him by the car, provided he used due care, if he was induced to cross by the signal made to him by the flagman, and if that signal was carelessly or negligently made at a time when it was unsafe to cross on account of the movement of the car.

The jury returned a verdict for the plaintiff for \$7500; and the case was reserved for the consideration of the whole Court.

J. G. Abbott and *P. H. Sears*, for the defendants. The defendants

had, for all purposes incident to the complete enjoyment of their franchise, the right of exclusive possession and use of the place where the accident happened, against the owners of the fee, and still more against all other persons. *Hazen v. Boston & Maine Railroad*, 2 Gray, 574; *Brainard v. Clapp*, 10 Cush. 6; Gen. Stat. c. 63, §§ 102, 103. The defendants were not bound to keep a flagman there, or exercise the other precautions prescribed for the crossing of highways or travelled places. Gen. Sts. c. 63, §§ 64-66, 83-91; *Boston & Worcester Railroad v. Old Colony Railroad*, 12 Cush. 608. The license or permission, if any, to the plaintiff to pass over the premises did not impose any duty on the defendants, but he took the permission, with its concomitant perils, at his own risk. *Howland v. Vincent*, 10 Met. 371, 374; *Scott v. London Docks Co.*, 11 Law Times (N. S.), 383; *Chapman v. Rothwell*, El. Bl. & El. 168; *Southcote v. Stanley*, 1 Hurlst. & Norm. 247; *Hounsell v. Smyth*, 7 C. B. (N. S.) 729, 735, 742; *Binks v. South Yorkshire Railway, &c.*, 32 Law Journ. (N. S.) Q. B. 26; *Blithe v. Topham*, 1 Rol. Ab. 88; s. c. 1 Vin. Ab. 555, pl. 4; Cro. Jac. 158. The defendants did not hold out to the plaintiff an invitation to pass over. *Hounsell v. Smyth* and *Binks v. South Yorkshire Railway*, above cited. The allowing or making of such private crossing was not in itself such an invitation, and did not involve the duty of such precautions. The keeping of a flagman there was wholly for the purpose of preventing persons from crossing, not for the purpose of holding out invitations at any time. The signal that the plaintiff might cross was in answer to his inquiry, and was, at most, only revoking the prohibition, or granting permission; it was not holding out an invitation. The duty of the flagman was simply to warn persons against crossing; and if the flagman held out an invitation or even gave permission to the plaintiff to cross, he went beyond the scope of his employment, and the defendants are not liable on account thereof. *Lygo v. Newbold*, 9 Exch. 302; *Middleton v. Fowle*, 1 Salk. 282. Even if the defendants had carelessly held out an invitation to the plaintiff to cross, still they would not be liable; for the report shows that after such supposed invitation the plaintiff might, by the exercise of ordinary care, have avoided the injury; that the plaintiff was himself at the time in the wrong; and that his own negligence and fault contributed to the accident. *Todd v. Old Colony & Fall River Railroad*, 7 Allen, 207; s. c. 3 Allen, 18, and cases cited; *Denny v. Williams*, 5 Allen, 1, and cases cited; *Spofford v. Harlow*, 3 Allen, 177, and cases cited.

S. J. Thomas, for the plaintiff.

BIGELOW, C. J. This case has been presented with great care on the part of the learned counsel for the defendants, who have produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line which marks the limit of the defendant's liability for damages caused by the acts of their agents, the case at bar

falls. But on careful consideration we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on croneous instructions in matter of law.

In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfil. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrong-doers. So a licensee, who enters on premises by permission only, without any enticement, allurements, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pit-falls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

On the other hand, there are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or defect in the way or passage which was held out and used as the common and proper place of access to the premises. The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep

his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurements, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

This distinction is fully recognized in the most recent and best considered cases in the English Courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In *Corby v. Hill*, 4 C. B. (N. S.) 556, the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder engaged in erecting a house on the land to place materials on the road; the plaintiff, having occasion to use the road for the purpose of going to the owner's residence, ran against the materials and sustained damage, for which the owner was held liable. Cockburn, C. J., says: "The proprietors of the soil held out an allurements whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house as the means of access thereto." In *Chapman v. Rothwell*, El. Bl. & El. 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trap-door to be open without sufficient light or proper safeguards, in a passage-way through which access was had from the street to his office. This decision was put on the ground that the defendant, by holding out the passage-way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by Keating, J., in *Hounsell v. Smyth*, 7 C. B. (N. S.) 738. In the last named case the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is

shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger and not on the owner. The same distinction is stated in *Barnes v. Ward*, 9 C. B. 392; *Hardecastle v. South Yorkshire Railway, &c.*, 4 Hurlst. & Norm. 67; and *Binks v. South Yorkshire Railway, &c.*, 32 Law Journ. (N. S.) Q. B. 26. In the last cited case the language of Blackburn, J., is peculiarly applicable to the case at bar. He says, "There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such." See also, for a clear statement of the difference between cases where an invitation or allurements is held out by the defendant, and those where nothing appears but a mere license or permission to enter on premises, *Balch v. Smith*, 7 Hurlst. & Norm. 741, and *Scott v. London Docks Co.*, 11 Law Times (N. S.), 383.

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot in any just view of the evidence be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was situated between two streets of the city (which are much frequented thoroughfares), and was used by great numbers of people who had occasion to pass from one street to the other, and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner as if it had been a highway, but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that when the plaintiff started to go over the tracks with his wagon, it was in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff under the instructions of the Court, that the defendants induced the plaintiff to cross at the time when he at-

tempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged among other things with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing.

Nor do we think it can be justly said that the flagman in fact held out no inducement to the plaintiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants induced the plaintiff to pass, and that he acted in so doing within the scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the Court; nor do we see any reason for supposing that the instructions on this point were misunderstood or misapplied by the jury. If they lacked fulness, the defendants should have asked for more explicit instructions. Certainly the evidence as reported well warranted the finding of the jury on this point.

It was also urged that, if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at the place in question, which they were not bound to use, and that the case would present the singular aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The Court were not requested at the trial to withdraw the case from the jury on the ground that the plaintiff had failed to show he was in the exercise of due care at the time the accident happened. Upon the evidence, as stated in the report, we cannot say, as matter of law, that the plaintiff did not establish this part of his case.

Judgment on the verdict.

After the above decision was rendered, the verdict was set aside, by CHAPMAN, J., as against the evidence.

CHAPTER VIII.

EXTRA-HAZARDOUS OCCUPATIONS.—ACTING AT PERIL.—DUTY OF INSURING SAFETY.

FLETCHER v. RYLANDS ET AL.

1865. *Law Reports*, 3 *Hurlstone & Coltman*, 774.¹

FLETCHER v. RYLANDS ET AL.

1866. *Law Reports*, 1 *Exchequer*, 265.RYLANDS ET AL., PLAINTIFFS IN ERROR v. FLETCHER,
DEFENDANT IN ERROR.1868. *Law Reports*, 3 *House of Lords*, 330.

IN November, 1861, Fletcher brought an action against Rylands and Horrocks to recover damages for an injury caused to his mines by water flowing into them from a reservoir which defendants had constructed. The declaration (set out in L. R. 1 Exch. 265, 266) contained three counts, each count alleging negligence on the part of the defendants. The case came on for trial at the Liverpool Summer Assizes, 1862, when a verdict was entered for the plaintiff, subject to an award to be thereafter made by an arbitrator. Subsequently the arbitrator was directed, instead of making an award, to state a special case for the consideration of the Court of Exchequer.

The material facts in the special case stated by the arbitrator were as follows:—

Fletcher, under a lease from Lord Wilton, and under arrangements with other landowners, was working coal mines under certain lands. He had worked the mines up to a spot where he came upon old horizontal passages of disused mines, and also upon vertical shafts which seemed filled with marl and rubbish.

Rylands and Horrocks owned a mill standing on land near that under which Fletcher's mines were worked. With permission of Lord Wilton, they constructed on Lord Wilton's land a reservoir to supply water to their mill. They employed a competent engineer and competent contractors to construct the reservoir. It was not known to Rylands and Horrocks, nor to any of the persons employed by them, that any coal had ever been worked under or near the site of the reservoir; but

¹ Statement abridged. — Ed.

in point of fact the coal under the site of the reservoir had been partially worked at some time or other beyond living memory, and there were old coal workings under the site of the reservoir communicating by means of other and intervening old underground workings with the recent workings of Fletcher.

In the course of constructing and excavating for the bed of the said reservoir, five old shafts, running vertically downwards, were met with in the portion of land selected for the site of the said reservoir. At the time they were so met with the sides or walls of at least three of them were constructed of timber, and were still in existence, but the shafts themselves were filled up with marl, or soil of the same kind as the marl or soil which immediately surrounded them, and it was not known to, or suspected by, the defendants, or any of the persons employed by them in or about the planning or constructing of the said reservoir, that they were (as they afterwards proved to be) shafts which had been made for the purpose of getting the coal under the land in which the said reservoir was made, or that they led down to coal workings under the site of the said reservoir.

For the selection of the site of the said reservoir, and for the planning and constructing thereof, it was necessary that the defendants should employ an engineer and contractors, and they did employ for those purposes a competent engineer and competent contractors, by and under whom the said site was selected and the said reservoir was planned and constructed, and on the part of the defendants themselves there was no personal negligence or default whatever in or about or in relation to the selection of the said site, or in or about the planning or construction of the said reservoir; but in point of fact reasonable and proper care and skill were not exercised by or on the part of the persons so employed by them, with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear.

The said reservoir was completed about the beginning of December, 1860, when the defendants caused the same to be partially filled with water, and on the morning of the 11th December in the same year, whilst the reservoir was so partially filled, one of the shafts which had been so met with as aforesaid gave way and burst downwards; in consequence of which the water of the reservoir flowed into the old workings underneath, and by means of the underground communications so then existing between those old coal workings and the plaintiff's coal workings in the plaintiff's colliery, as above described, large quantities of the water so flowing from the said reservoir as aforesaid found their way into the said coal workings in the plaintiff's colliery, and by reason thereof the said colliery became and was flooded, and the working thereof was obliged to be and was for a time necessarily suspended.

The question for the opinion of the Court was whether the plaintiff was entitled to recover damages from the defendants by reason of the matters thus stated by the arbitrator.

Manisty (with whom was *J. A. Russell*), for the plaintiff. The defendants are liable for the damage resulting to the plaintiff from their diverting the water from its natural course, and collecting it in a reservoir. [POLLOCK, C. B. {It is not an unlawful act for a man to collect water in a reservoir upon his own land.} Provided he does not allow it to escape so as to injure his neighbor's land. If he does it is a trespass. | The maxim applies: *Sic utere tuo ut alienum non lædas*. The plaintiff has a right to enjoy his land free from the injury resulting from an act, not in the ordinary course, done by the defendants on their land. / A person who collects on his land a dangerous element, be it fire or water, and allows it to escape and injure his neighbor's land, is liable for the consequences. / If a man employed the most skilful person to make a fence on his land to prevent his cattle trespassing on his neighbor's land, and the fence proved insufficient, he would be liable for the damage, although there was no negligence on his part and he had no reason to suppose that the fence would not be sufficient. [BRAMWELL, B. Suppose a man digs a well upon his land, and afterwards his neighbor, whose land is on a lower level, opens a mine and the water flows into it, would the owner of the well be liable?]} Each adjoining landholder has a right to work up to his boundary, and if by so doing water flows in its natural course and causes damage, there is no remedy; but if a person artificially collects water on his land, and allows it to flow into his neighbor's mine, he is liable for the consequences. *Smith v. Kenrick*, 7 C. B. 515 (E. C. L. R. vol. 62), was the case of two adjoining mine owners, and it was held that the defendant was not liable for the inundation of the plaintiff's mine, because the defendant had only worked his mine in the ordinary course, and without any design to injure his neighbor. But the Court in their judgment said: "There can be no doubt that a man may cause water to flow from his own premises into his neighbor's, so as to make himself liable to an action, — for instance, by erecting a mound or other work to give it that direction." *Aldred's Case*, 9 Rep. 57 a, proceeded on the principle that a man has no right to do on his own land that which may injure his neighbor's. In *Gale on Easements*, p. 370, 3d ed., it is said: "Generally, it is a violation of the common right of a landowner if any act be done on other land the consequence of which is the introduction of any substance on to his land; thus, if in *Smith v. Kenrick*, *supra*, the water had been on the surface and confined by a dam, and the defendant by cutting through the dam had let loose the water on to the surface of the plaintiffs' land, he would clearly have been liable even though there had been on the plaintiffs' land a natural barrier to the water, and the plaintiffs had removed this barrier before the water was let loose." [MARTIN, B., referred to *Harrison v. The Great Northern Railway Company*, 3 H. & C. 231.] In *Alston v. Grant*, 3 E. & B. 128 (E. C. L. R. vol. 77), the owner of land on which there was a house constructed on the other part of the land a sewer, and some years after let the house; afterwards, by reason of the original

faulty construction of the sewer, and the continued user of it by the owner in such faulty state, the house was injured, and it was held that the owner was liable to his lessee for keeping and continuing the sewer so constructed. [BRAMWELL, B., referred to *Cooke v. Waring*, 2 H. & C. 332.] This case, in some respects, resembles *Bagnall v. The London & North Western Railway Company*, 7 H. & N. 423,¹ where the plaintiffs, without any fault or negligence on their part, but as a natural consequence of the fair and lawful working of their mine, sustained damage by reason of the defendants having altered the natural condition of things on their land. *Tenant v. Goldwin*, 1 Salk. 360, laid down, and the recent case of *Hodgkinson v. Ennor*, 4 B. & S. 229 (E. C. L. R. vol. 116), has recognized and adopted the principle that one who creates foul water on his own land must keep it that it may not trespass. The same principle must apply to one who collects water artificially, and whether the water collected be pure or foul can make no difference. *Baird v. Williamson*, 15 C. B. n. s. 376 (E. C. L. R. vol. 109), establishes the converse principle to that laid down in *Smith v. Kenrick*, *supra*, viz., that where there are adjoining mines on different levels, the owner of the mine on the lower level is not bound to receive from the mine on the upper level water other than that which flows naturally according to the laws of gravitation. It may be said that in that case the water was sent to the plaintiff's mine intentionally, but intent is not essential to the maintenance of the action. "If a man assault me, and I lift up my staff to defend myself, and in lifting it up strike another, an action lies by that person, . . . because he that is damaged ought to be recompensed" (Broom's Legal Maxims, 4th ed. p. 358, and the cases there cited). The rule of law is as stated by Blackburn, J., in *Williams v. Groucott*, 4 B. & S. 149 (E. C. L. R. vol. 116). That learned judge there said: "Looking at the general rule of law that a man is bound to use his property so as not to injure his neighbor, it seems to me that when a party alters things from their normal condition so as to render them dangerous to already acquired rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights." [MARTIN, B. The case of *Chadwick v. Trower*, 6 Bing. N. C. 1 (E. C. L. R. vol. 37), seems in favor of the defendants.] In *Chadwick v. Trower* the only decision was that the mere circumstance of juxtaposition does not render it incumbent on a person who pulls down his vault to give notice of his intention to the owner of an adjoining vault. It is true that the Court there expressed an extrajudicial opinion that a person pulling down his vault, is not bound if ignorant of the existence of an adjoining vault, to use such care in the pulling down that the adjoining vault shall not be injured. But the truth of that proposition cannot depend on the question of knowledge or ignorance in the person pulling down, but on whether he is or is not interfering with his neighbor's natural rights.

¹ In error, 1 H. & C. 544.

In any view that case is distinguishable from the present, since the defendant was not, as here, suffering a trespass to be committed on the plaintiff's land. In *Chauntler v. Robinson*, 4 Exch. 163, Parke, B., said that it is the duty of the owner of a house to keep it in such a state that his neighbor may not be injured by its fall. And that rule applies as much to a reservoir as it does to a building. *Sutton v. Clarke*, 6 Taunt. 29, 44 (E. C. L. R. vol. 1), is in the plaintiff's favor. Gibbs, C. J., in delivering judgment there said, that an individual "who for his own benefit makes an improvement on his own land according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor," is answerable if he thereby unwittingly injures his neighbor. A direct analogy may be drawn from the common-law rule as to fire, viz. that one who kindled a fire, whether in his house or in his field, must see that it did no harm, and answer for damage done: *Tubervil v. Stamp*, 1 Salk. 13. *Vaughan v. The Taff Vale Railway Company*, 5 H. & N. 679, has no bearing on the point under discussion, for the ground of decision there was that the legislature had sanctioned the use made of a dangerous instrument. [They also referred to *Backhouse v. Bonomi*, 9 H. L. Cas. 503.]

Mellish (*T. Jones* with him), for the defendants. The question before the Court must be decided on principle, since there is no decision directly in point. The question is substantially this: The plaintiff on his own land does a secret act, the doing of which was not naturally to be anticipated; the defendants on their land do an act lawful in itself, and not apparently likely to produce damage, but which, by reason of the plaintiff's secret act becomes dangerous to the plaintiff's land; are the defendants responsible, without negligence, for the damage which ensues? Such a liability, if it exists, must, in most cases, necessarily entail considerable hardship. The argument on the other side is that the plaintiff has a right to be free from the water coming from the defendant's reservoir, and that this right is of an absolute character. Precisely the same may be said of the right which every one has to be free from damage to his person; and yet, where a collision takes place without negligence, no action will lie for the injury resulting from it. The maxim, *Sic utere tuo ut alienum non lædas*, is not absolute in its application. By virtue of it a man is no doubt responsible for acts which he knows, or has the means of knowing, will cause injury, and also for acts which cause injury from the negligent mode in which he performs them. But, on the other hand, if he uses due care, and the consequences of his acts are such as could not be foreseen, then it is submitted that he is not responsible. Now the essence of this case is that the possibility of the defendants' act causing the damage it did was unknown to the defendants. It has been argued, indeed, that in trespass knowledge is immaterial, and that here there was a trespass by the defendants. But that is not so. The circumstance of water escaping from the defendants' reservoir by means of a defect of which the defendants neither did nor could know cannot be treated as the defend-

ants' trespass. The defendants did not themselves bring the water to their land; the water coming to their land naturally, they used it when there for an ordinary purpose. If trespass will not lie, neither will an action on the case, for that involves the violation of some duty. To support that form of action negligence must be made out, or, at all events, a knowledge on the defendants' part that their act was dangerous. The cases cited on the other side are distinguishable. To most of them the observation applies that the person sought to be made responsible was aware, when he did the act which caused damage, of the probability that damage would result. On that ground *Tenant v. Goldwin*, 1 Salk. 21, 360, 2 Lord Raym. 1089; *Alston v. Grant*, *supra*; *Hodgkinson v. Ennor*, *supra*; and *Backhouse v. Bonomi*, *supra*, are distinguishable. Moreover, in *Tenant v. Goldwin* the declaration contained an averment that the wall which kept in the filth ought of right to be repaired by the defendant; and the question arose after verdict on a motion in arrest of judgment. In *Alston v. Grant* the defendant was rightly held liable for damage arising from the continued use of a defectively constructed sewer, with knowledge of its defective state. In *Lawrence v. The Great Northern Railway Company*, *supra*, the water was turned on to the plaintiff's land by the direct act of the defendants; and *Bagnall v. The London & North Western Railway Company*, *supra*, proceeded upon the same principle. In *Smith v. Kenrick*, *supra*, Cresswell, J., in delivering judgment, after reviewing the authorities, and pointing out that in each of them "negligence was imputed to the defendant in doing the act on his own land which proved injurious to his neighbor," distinguished the case under discussion on the ground that, inasmuch as there was no negligence in the defendant, he was not responsible. In *Chauntler v. Robinson*, *supra*, the only point decided was that no obligation was cast by law on the owner of a house, as such, to keep it in substantial repair. It is true that *Sutton v. Clarke*, *supra*, contains a *dictum* unfavorable to the defendants, but that *dictum* was not necessary for the decision of the case. The only instances which are to be found of a liability analogous to that which it is sought to impose on the defendants are instances of an exceptional liability, which is founded on the custom of the realm. Instances of such a liability occur in the case of carriers and innkeepers. So also, prior to the 6 Ann. c. 31, an action upon the case lay upon the general custom of the realm against the master of a house if a fire were kindled there and consumed the house or goods of another. Com. Dig. tit. *Action upon the Case for Negligence* (A. 6); *Tubervil v. Stamp*, *supra*; *Filliter v. Phippard*, 11 Q. B. 347 (E. C. L. R. vol. 63). The fair inference from those exceptions is that where the custom of the realm did not extend, the rule of the common law was that negligence must be shown. As regards the second question, viz., whether there was, in fact, negligence for which the defendants are responsible, *Chadwick v. Trower*, *supra*, is in point to show that, without the means of knowing that peculiar care is requisite, there is no negligence

in not using it. The facts stated in this case show that neither the engineer nor the contractors had the means of knowing the danger they caused to the plaintiff's mines. If they had that means, however, that circumstance would not in itself be sufficient to fix the defendants. *Butler v. Hunter*, 7 H. & N. 826.

Manisty replied.

Cur. adv. vult.

The learned judges having differed in opinion, the following judgments were delivered in the ensuing Trinity Vacation (June 23).

BRAMWELL, B. The facts on which, as it seems to me, the question here depends are as follows: The plaintiff is the occupier of mines which he has worked to the boundary of the property in or under which they are. The defendants have made a reservoir, and filled it with water, on the surface of property separated from the plaintiff's by property of an intervening owner. The water has escaped down old shafts into old workings on the defendants' premises, has passed through other old workings in the intermediate premises, has reached the plaintiff's workings, and done him damage. The defendants were not aware of the old underground workings nor of the communication between them. I agree with Mr. Mellish the case is singularly wanting in authority, and therefore, while it is always desirable to ascertain the principle on which a case depends, it is especially so here.

Now, what is the plaintiff's right? He had the right to work his mines to their extent, leaving no boundary between himself and the next owner. By so doing he subjected himself to all consequences resulting from natural causes, among others to the influx of all water naturally flowing in. But he had a right to be free from what has been called "foreign" water, that is, water artificially brought or sent to him directly or indirectly by its being sent to where it would flow to him. The defendants had no right to pour or send water on to the plaintiff's works. Had they done so knowingly it is admitted an action would lie; and that it would if they did it again. That is also proved by the case of *Hodgkinson v. Ennor*, *supra*. The plaintiff's right then has been infringed; the defendants in causing water to flow to the plaintiff have done that which they had no right to do; what difference in point of law does it make that they have done it unwittingly? I think none, and consequently that the action is maintainable. The plaintiff's case is, you have violated my rights, you have done what you had no right to do, and have done me damage. If the plaintiff has the right I mention, the action is maintainable. If he has it not, it is because his right is only to have his mines free from foreign water by the act of those who know what they are doing. I think this is not so. I know no case of a right so limited. As a rule the knowledge or ignorance of the damage done is immaterial. The burthen of proof of this proposition is not on the plaintiff.

I proceed to deal with the arguments the other way. It is said there must be a trespass, a nuisance, or negligence. I do not agree, and I think *Backhouse v. Bonomi*, *supra*, shows the contrary. But why is

not this a trespass? see *Gregory v. Piper*, 9 B. & C. 591 (E. C. L. R. vol. 17). Wilfulness is not material: *Leame v. Bray*, 3 East, 593. Why is it not a nuisance? The nuisance is not in the reservoir, but in the water escaping. As in *Backhouse v. Bonomi*, the act was lawful; the mischievous consequence is a wrong. Where two carriages come in collision, if there is no negligence in either it is as much the act of the one driver as of the other that they meet. The cases of carriers and innkeepers are really cases of contract, and though exceptional; furnish no evidence that the general law in matters wholly independent of contract is not what I have stated. The old common-law liability for fire created a liability beyond what I contend for here. I cannot think *Chadwick v. Trower*, *supra*, opposed to this view. The Court held the count bad. They laid stress on the defendants not having notice, but I think the decision would have been, and properly been, the same had they had notice; because it was not shown that there was any right in the plaintiff to have his vaults so built as to impose on the defendants the burthen of pulling down their premises in any particular way or with any particular care. On the other hand, the cases of *Backhouse v. Bonomi*, *supra*; *Hodgkinson v. Ennor*, *supra*; *Tenant v. Goldwin*, *supra*, seem in principle in point for the plaintiff. It is clear that in the latter case the Court decided that the defendant must at his peril keep his filth from injuring his neighbor, for "'t is a charge of common right," — *Sic utere tuo ut alienum non lædas*.

I think, therefore, on the plain ground that the defendants have caused water to flow into the plaintiff's mines which but for their, the defendants', act would not have gone there, this action is maintainable. I think that the defendants' innocence, whatever may be its moral bearing on the case, is immaterial in point of law. But I may as well add, that if the defendants did not know what would happen, their agents knew that there were old shafts on their land, — knew therefore that they must lead to old workings, knew that those old workings might extend in any direction, and consequently knew damage might happen. The defendants surely are as liable as their agents would be, — why should not they and the defendants be held to act at their peril? But I own this seems to me rather to enforce the rule that knowledge and wilfulness are not necessary to make the defendants liable, than to give the plaintiff a separate ground of action.

MARTIN, B. The circumstances of this case raise two questions. First, assuming the plaintiff and defendants to be the owners of two adjoining closes of land, and at some time or other beyond living memory coal had been worked under both closes, and that the workings under the close of the defendants communicated with the workings under the close of the plaintiff, but of the existence of such workings both plaintiff and defendants were ignorant, and that the defendants, without any negligence or default whatever, made a reservoir upon their own land for the purpose of collecting water to supply a manufactory, and that the water escaped from an old shaft at the bottom of the reservoir

into the old workings below the defendants' close and thence into the plaintiff's close, and did damage there, are the defendants responsible?

N The second question is, assuming the defendants not to be responsible upon the above state of facts, does it make any difference that the defendants employed a competent engineer and competent contractors who were ignorant of the existence of the old workings, and who selected the site of the reservoir and planned and constructed it, and on the part of defendants themselves there was no personal negligence or default whatever, but in point of fact reasonable and proper care and skill were not exercised by and on behalf of the persons so employed with reference to the old shafts found at the bottom of the reservoir to provide for the sufficiency of the reservoir to bear the pressure of the water which, when filled to the height proposed, it would have to bear.

It has been contended on behalf of the plaintiff that the first question ought to be decided in the affirmative. Several cases were cited in support of this view, but it was admitted that none of them were direct authorities. Several *dicta* and opinions of judges were also cited, but it seems to me that it cannot be affirmed that in any one of them the judge had clearly in his contemplation the state of things supposed by the first question to exist. If therefore there was no authority the other way, the case would have to be decided upon principle and legal analogy.

First, I think there was no trespass. In the judgment of my brother Bramwell, to which I shall hereafter refer, he seems to think the act of the defendants was a trespass, but I cannot concur, and I own it seems to me that the cases cited by him, viz., *Leame v. Bray*, *supra*, and *Gregory v. Piper*, *supra*, prove the contrary. I think the true criterion of trespass is laid down in the judgments in the former case, viz., that to constitute trespass the act doing the damage must be immediate, and that if the damage be mediate or consequential (which I think the present was), it is not a trespass. Secondly, I think there was no nuisance in the ordinary and generally understood meaning of that word, that is to say, something hurtful or injurious to the senses. The making a pond for holding water is a nuisance to no one. The digging a reservoir in a man's own land is a lawful act. It does not appear that there was any embankment, or that the water in the reservoir was ever above the level of the natural surface of the land, and the water escaped from the bottom of the reservoir and in ordinary course would descend by gravitation into the defendants' own land, and they did not know of the existence of the old workings. To hold the defendants liable would therefore make them insurers against the consequence of a lawful act upon their own land when they had no reason to believe or suspect that any damage was likely to ensue.

No case was cited in which the question has arisen as to real property; but as to personal property the question arises every day, and there is no better established rule of law than that when damage is

done to personal property, and even to the person, by collision either upon the road or at sea, there must be negligence in the party doing the damage to render him legally responsible, and if there be no negligence the party sustaining the damage must bear with it. The existence of this rule is proved by the exceptions to it, viz., the cases of the innkeeper and common carrier of goods for hire, who are *quasi* insurers. These cases are said to be by the custom of the realm, treating them as exceptions from the ordinary rule of law. In the absence of authority to the contrary, I can see no reason why damage to real property should be governed by a different rule or principle than damage to personal property. There is an instance also of damage to real property when the party causing it was at common law liable upon the custom of the realm as a *quasi* insurer, viz., the master of a house, if a fire had kindled there and consumed the house of another. In such case the master of the house was liable at common law without proof of negligence on his part: Comyns' Digest, *Action upon the Case for Negligence* (A. 6). This seems to be an exception from the ordinary rule of law and, in my opinion, affords an argument that in other cases, such as the present, there must be negligence to create a liability. For these reasons I think the first question ought to be answered in favor of the defendants.

Then arises the second question, viz., does it make any difference that reasonable and proper care and skill were not exercised by the engineer and contractors employed by the defendants (they being competent persons) with reference to the shafts, which were five old shafts running vertically downwards in the portion of the land selected for the reservoir; but which were not known or suspected by any one to be, as they afterwards proved to be, shafts which had been made for the purpose of getting coal under the land beneath the reservoir, or that they led to coal under it. Now, assuming that the want of reasonable and proper care and skill by the engineer and contractors constituted, in point of law, want of reasonable and proper skill by the defendants themselves (which is by no means a clear proposition), I nevertheless think that the defendants are not responsible. The assumed facts are these. The defendants dig a reservoir in their own land; they do not know or suspect that their doing it in the manner they did would do any damage to their neighbor. Is there any authority to show that the law casts upon them a liability for damage should it occur? In my opinion there is authority to the contrary. *Prima facie* a man may excavate a reservoir for water in his own land. Whether he does so carefully and skilfully would seem to be his own concern, and if he be ignorant that any fact exists which makes it dangerous to his neighbor, it is difficult to see what duty is imposed upon him to take any peculiar care or use any particular skill in the matter. When a man does an act upon his own close which of itself is lawful, but is alleged to be wrongful towards an adjoining neighbor by reason of the existence of some underground openings between their

two closes, reason and good sense would seem to require that he should know, or have the means of knowledge of the existence of the openings. How can a man be said to be negligent when he is ignorant of the existence of the circumstance which requires the exercise of care? But as I have before said, I think the second question, and therefore necessarily the first, is concluded by authority.

The case of *Trower v. Chadwick* was an action in the Common Pleas, and is reported, 3 Bing. N. C. 334. A cause of action alleged in the declaration was that the defendant was owner and occupier of a vault and walls, and was about to pull them down, and that it was his duty to use due care and skill in pulling them down, but that he did not do so, and thereby plaintiff's vault and walls were damaged. The Court of Common Pleas held that this duty was imposed by law, and that a breach which alleges that the defendant conducted himself so carelessly, negligently, and unskillfully in pulling down his vault and walls as thereby to injure the plaintiff's vault and walls, afforded and was a good cause of action. Error was brought, and the judgment of the Court of Exchequer Chamber is reported in 6 Bing. N. C. 1. The judgment of the Court of Common Pleas was declared to be erroneous in the most direct and express terms. The judgment was delivered by Baron Parke. He said the duty alleged was to use due care and skill in pulling down the vault and walls adjoining the plaintiff's vault and walls, so that, for want of such care and skill, the plaintiff's vault and walls should not be damaged, and the breach was that the defendant did not use such due care and skill, and that by reason thereof damage ensued. He then proceeds thus: "The question is, whether the law imposes upon the defendant an obligation to take such care in pulling down his vault and walls as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognizant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence; for one degree of care would be required where no vault exists but the soil is left in its natural and solid state; another where there is a vault; and another and still greater degree of care would be required where the adjoining vault was in a weak and fragile condition. How is the defendant to ascertain the precise degree of care and caution the law requires of him if he has no notice of the existence or of the nature of the structure? We think that no such obligation as that alleged exists in the absence of notice." Now, substituting defendants' reservoir for defendant's vault and walls in *Trower v. Chadwick*, and plaintiff's close and coal mine for the plaintiff's vault, the cases seem to be identical. I can perceive no distinction. I therefore think both questions ought to be answered in the negative, and that the defendants are entitled to our judgment.

I have already referred to the judgment of my brother Bramwell, which I have carefully read and considered, but cannot concur in it. I entertain no doubt that if the defendants directly and by their immediate

act cast water upon the plaintiff's land it would have been a trespass, and that they would be liable to an action for it. But this they did not do. What they did was this, they dug a reservoir in their own land and put water in it which, by underground openings of which they were ignorant, escaped into the plaintiff's land. I think this a very different thing from a direct casting water upon the land, and that the legal liabilities consequent upon it are governed by a different principle.

So also I do not think the cases cited by him as in point of principle in favor of the plaintiff really are so. In *Backhouse v. Bonomi* the act done by the defendant was removing the natural and rightful support of his neighbor's land, which at the time he must have known might and probably would do damage. This seems to me a very different thing from making a reservoir and filling it with water, from which no one supposed any damage would arise. As to the case of *Tenant v. Goldwin*, reported twice in Salkeld, 1 Salk. 21, 360, and also in Lord Raymond's Reports, 2 Ld. Raym. 1089, I cannot understand what difficulty there was in it, or how it can be an authority in the present case. Judgment had gone by default. The motion was in arrest of judgment, and the declaration contained an averment that the defendant *debit et solebat* to repair a wall between the plaintiff's and defendant's closes, and that by reason of the want of repair of the wall the damage ensued. This averment was admitted to be true by the form of the proceeding, and being admitted, I cannot myself see where the difficulty was as to the defendant's liability, or how the case can be an authority when no such liability to repair is admitted to exist. It is not alleged in the present case that the defendant was under a liability to stop up the opening in his own land from the adjoining land.

I still retain the opinion I originally formed. I think the case is governed by *Chadwick v. Trower*, and that to hold the defendant liable without negligence would be to constitute him an insurer, which, in my opinion, would be contrary to legal analogy and principle.

POLLOCK, C. B. The question in this case is, in my judgment, one of great difficulty, and therefore of much doubt. Apparently it has never before been the subject of litigation, for the reports are without any decided case in point, and the books of authority are silent on the immediate matter, and afford only indirect assistance. The general question is, for what acts done on his own land (and apparently quite lawful) is the owner of an estate liable, if it should turn out in the result that damage is thereby occasioned to the estate of another (who may be an immediate or a distant neighbor) on account of some circumstance entirely unknown to the proprietor who causes the act to be done?

I quite agree with my brother Bramwell that, in a case like the present, it is most important to ascertain the principle on which a decision should proceed. As one mode of doing so I will assume that the communication by which the water escaped from the defendant's to the plaintiff's estate was a natural one. There are several counties in Eng-

land (Derbyshire especially) where this might occur, — where a natural communication might cause water to pass underground to a distant property, such communication being wholly unknown and unsuspected by either party. Now, in such a case would the distant neighbor have a right of action if, in consequence of an attempt to form an artificial piece of water, whether for utility or ornament, it escaped into an underground channel and did damage beyond the limits of the property on which the reservoir was formed? I see no ground on which an action could be maintained for the damage arising under such circumstances. Well, then, if the underground communication be the result of the complaining party having exercised his right to take the minerals, does that give him a better right to complain? I own I think not, and I agree with my brother *Martin* that no action will lie. It appears to me that my brother *Bramwell* assumes too strongly that the complainant “had a right to be free from what is called ‘foreign water.’” That may be so with reference to surface-rights; but I am not prepared to hold that this applies to every possible way in which water may happen to come. There being, therefore, no authority for bringing such an action, I think the safer course is to decide in favor of the defendants.

With respect to the negligence of the engineer employed to make the reservoir, it is not stated in what it consisted, nor is it shown that it is such as would make the owner of the land responsible, and any liability arising from the acts of the engineer is more a question of fact than of law.

CHANNELL, B. I only heard a part of the argument, and therefore express no opinion.

Judgment for the defendants.

The plaintiff brought error to the Exchequer Chamber.

Feb. 8, 1866. *Manisty*, Q. C. (*J. A. Russell* with him), for plaintiff. [Argument omitted.]

Mellish, Q. C. (*T. Jones* with him), for defendants. The question is a novel one, but authority and reason are in favor of the defendants. It is true the defendants have altered the condition of their land, but on the other hand, if the plaintiff had left the intervening land in its natural state, no mischief would have ensued. The mischief was caused by secret acts done partly by strangers, partly by the plaintiff himself, which have broken down the natural partition of the lands, and opened the channels by which the water has come, and it will be strange if those secret acts, not communicated to the defendants, should impose on them a liability. But on broad principles there is no such obligation as is contended for on the other side. The only obligation on the defendants is to take care, that is, reasonable care, not to injure the property of others; and to establish their liability in this action it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbor's property from anything done

upon his own land. It is clear that there is no such obligation with respect to personal property. The right not to have "foreign water" sent upon one's land is not a greater or more important right than the right not to have one's person injured, but in the latter case no right of action arises unless the damage is caused by the direct act of the defendant himself or by his negligence. The same rule applies to real property, and though the cases are fewer they are to this effect. The instances in which the owner of real property has been held liable may be classified thus: first, acts of trespass; second, acts purposely done, and which are calculated to cause the injury complained of, as in *Aldred's Case*, 9 Rep. 57 b; third, cases where, by reason of the natural relation of the properties, a legal relation has been constituted between them; as in the case of the right to support, or the right to a watercourse, which are natural easements, and as to which the plaintiff need not allege any special title in himself, nor any negligence in the defendant. Here no right of this latter class is involved, but the right is the same as the right of any subject not to be injured by any other subject; and the fallacy in the judgment of Bramwell, B., in the Court below, is in assuming that there is any such right as "to be free from foreign water," or "not to have water turned in upon one." There is no such right distinct from the general right of ownership in the soil, and the case stands on the same footing as if the owner had himself been drowned at the bottom of the mine. The second class of cases is illustrated by *Hodgkinson v. Ennor*, 4 B. & S. 229 (E. C. L. R. vol. 116); 32 L. J. (Q. B.) 231, for it was there found as a fact that the defendant knew that the channel down which he poured the dirty water would carry it to the plaintiff's premises; he threw it into the swallet meaning that it should be carried away, and it might perhaps be admitted that, having done this intentionally, he would be liable whether he knew where it would go to or not; but the defendants here have tried to keep the water in, but by its own weight it has forced its way through.

[LUSH, J. Suppose the bank of the reservoir had burst, and the water had flowed over the surface and down the pit's mouth.]

The distinction between the surface and underground passages is only material as a circumstance of negligence; with reference to the surface, the facts are known which give rise to the obligation to take care, but the ignorance of the state of things underground takes away the opportunity of exercising care, and therefore the duty to exercise it. It is for this purpose only that the defendants rely on the case of *Chadwick v. Trower*, 6 Bing. N. C. 1 (E. C. L. R. vol. 37); supposing it made out that there is no liability except where there is carelessness, that case shows that there can be no carelessness where there is no knowledge, nor any circumstances giving the means of obtaining knowledge, with a duty to know; and there is no case where a defendant has been held liable without such knowledge or notice. That being so, it is immaterial whether or not the duty to take care means a duty to

insure against all consequences, for the occasion of that duty has never arisen.

[BLACKBURN, J. The present point may be illustrated thus: Suppose a man leans against my cart, if I remove the cart suddenly, and without warning, not knowing he is there, I am not liable; but if I do so knowing that he is there, though he has no right to lean against my cart, yet I am liable if my act injures him.

WILLES, J. Take the case of a continuous nuisance, I mean continuous in its own character; the person who erects it is liable at once, the person who succeeds to it is not liable unless he has notice and continues it, but it is said that as soon as he has notice of it he must abate. Suppose a man to collect a quantity of springs in such a manner as to cause them to pour down his neighbor's mine. Assuming that the person who succeeded to the possession of the land where the springs were so collected would not be liable until notice, yet you would admit that upon receiving notice he would be liable for continuing it. Then is there any case where the same doctrine has been held to apply to the originator of the nuisance?]

It is submitted that the liability would turn on the defendants' knowledge, and that in each case knowledge is the essential condition of liability. In the absence of any authority distinguishing liability in respect of injury to real property from liability in respect of other injuries, the doctrine laid down as to actions of the latter kind applies, and in these it is clear that negligence must be shown. This is illustrated by the case of *Scott v. London Dock Company*, 3 H. & C. 596, 34 L. J. (Ex.) 17, 220, where it was never doubted that negligence must be alleged and proved, and the only question was whether the fact that the bale which fell was under the management of the defendants' servants, was sufficient *prima facie* evidence of negligence. A common instance is that of collisions of ships at sea, or accidents caused by driving or riding along the highway as *Hammock v. White*, 11 C. B. N. s. 588 (E. C. L. R. vol. 103), 31 L. J. (C. P.) 129, in all which cases without negligence there is no liability.

[LUSH, J. Suppose the case of a gunpowder magazine bursting, what liability do you say its owners would incur?]

None, if there was no negligence as to the place where the powder was kept, or in the manner of keeping it. The liability as to fire, formerly an absolute duty to insure against all mischief caused to your neighbors by fire arising on your own property, is said to have been by the custom of the realm: *Turbervil v. Stamp*, 1 Salk. 13; Com. Dig., *Action on the Case for Negligence* (A. 6); and since the passing of 14 Geo. 3, c. 78, and the decision upon s. 86 of that act in *Filliter v. Phippard*, 11 Q. B. 347 (E. C. L. R. vol. 63), the liability for injury by fire is restricted to mischief arising from negligence, that is, it is put on the same footing as liability for other injuries. The sum of the argument is, that to make the defendant liable a wrongful act must be shown, and that to prove the act wrongful you must prove it negligent.

[WILLES, J., referred to *Gregory v. Piper*, 9 B. & C. 591 (E. C. L. R. vol. 17).].

That was a case of trespass, to which this cannot be compared, nor is there any count in trespass here. In *Gregory v. Piper* it was proved to be impossible that the act of the defendant's servant could be done as the defendant directed without committing a trespass; the act, therefore, became the direct act of the defendant, and that was the ground of the judgment. The distinction is between acts done directly by the defendant, which include all acts which are specifically directed by him, although not done by him physically or in his presence, and things which are only the consequences of what he does or directs to be done; it is in respect of these last that negligence is material.

[BLACKBURN, J., referred to *Tenant v. Goldwin*, 2 Ld. Raym. 1089; 1 Salk. 21, 360; 6 Mod. 311; Holt, 500.]

That case is open to the same observation; the mischief was the inevitable consequence of the combined facts that the defendant put the filth there, and that he did not repair the wall, which was his own wall. The case may indeed be put as a case of negligence, the negligence consisting in taking no care to prevent the filth from flowing into his neighbor's premises.

[Remainder of argument omitted.]

Cur. adv. vult.

May 14, 1866. The judgment of the Court (WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE, SMITH, and LUSH, JJ.) was delivered by

BLACKBURN, J. This was a special case stated by an arbitrator, under an order of *nisi prius*, in which the question for the Court is stated to be, whether the plaintiff is entitled to recover any and, if any, what damages from the defendants by reason of the matters thereinbefore stated.

In the Court of Exchequer, the Chief Baron and Martin, B., were of opinion that the plaintiff was not entitled to recover at all, Bramwell, B., being of a different opinion. ¶The judgment in the Exchequer was consequently given for the defendants, in conformity with the opinion of the majority of the Court. ¶The only question argued before us was whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. ¶We have come to the conclusion that the opinion of Bramwell, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the case, and consequently that the judgment below should be reversed, but we cannot at present say to what damages the plaintiff is entitled. ¶

It appears from the statement in the case that the plaintiff was damaged by his property being flooded by water which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

It appears from the statement in the case [see pp. 267-268], that the coal under the defendants' land had, at some remote period, been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears [see pp. 268-269] that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

It is found that the defendants, personally, were free from all blame, but that in fact proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendants are not so far identified with the contractors whom they employed as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench.

The case that has most commonly occurred and which is most frequently to be found in the books is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

As early as the Year Book, 20 Ed. 4, 11, placitum 10, Brian, C. J., lays down the doctrine in terms very much resembling those used by Lord Holt in *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1 Salk. 360, which will be referred to afterwards. It was trespass with cattle. Plea, that the defendant's land adjoined a place where defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. Brian, C. J., says: "It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any

other." He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of *Cox v. Burbidge*, 13 C. B. n. s. 438 (E. C. L. R. vol. 106), 32 L. J. C. P. 89, Williams, J., says: "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbor, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." So in *May v. Burdett*, 9 Q. B. 112 (E. C. L. R. vol. 42), the Court, after an elaborate examination of the old precedents and authorities, came to the conclusion that "a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril." And in 1 Hale's Pleas of the Crown, 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner "must at his peril keep him up safe from doing hurt; for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages;" though, as he proceeds to show, he will not be liable criminally without proof of want of care. In these latter authorities the point under consideration was damage to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. In Com. Dig. *Droit*. (M. 2), it is said that "if the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to enclose at his peril, to prevent damage by his cattle to the other 150 acres. For if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres at his peril." The authority cited is Dyer, 372 b., where the decision was that the cattle might be distrained; the inference from that decision, that the owner was bound to keep in his cattle at his peril, is, we think, legitimate, and we have the high authority of Comyns for saying that such is the law. In the note to Fitzherbert, Nat. Brevium, 128, which is attributed to Lord Hale, it is said, "If A. and B. have lands adjoining, where there is no enclosure, the one shall have trespass against the other on an escape of their beasts respectively: Dyer, 372, Rastal Ent. 621, 20 Ed. 4, 10; although wild dogs, &c., drive the cattle of the one into the lands of the other." No case is known to us on which in replevin it has ever been attempted to plead in bar to an avowry for

distress damage feasant, that the cattle had escaped without any negligence on the part of the plaintiff, and surely if that could have been a good plea in bar, the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify Williams, J., in saying, as he does in *Cox v. Burbridge, supra*, that the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not.

As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor; and the case of *Tenant v. Goldwin, supra*, is an express authority that the duty is the same, and is, to keep them in at his peril.

As Martin, B., in his judgment below, appears not to have understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and therefore all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod. p. 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, "and used (*solebat*) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall, which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (*jure debuit reparari*)." Yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar. The case is reported by Salkeld, who argued it, in 6 Mod., and by Lord Raymond, whose report is the fullest. The objection taken was that there was nothing to show that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of common right, and the allegation that the wall *de jure debuit reparari* by the defendant being an inference of law which did not arise from the facts alleged. Salkeld argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did of common right result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that Lord Holt, during the argument, intimated an opinion against him on that, but that after consideration the Court gave judgment for him on the second ground. In the report of 6 Mod. 314, it is stated: "And at another day *per totam curiam*: The declaration is good; for there is a sufficient cause of action appearing in it; but not upon the word '*solebat*.' If the defendant has a house of office enclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. . . . The reason here is, that one must use his own so as thereby not to hurt another, and as of common

right one is bound to keep his cattle from trespassing on his neighbor, so he is bound to use anything that is his so as not to hurt another by such user. . . . Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else." There is here an evident allusion to the same case in Dyer, see *ante*, p. 334, as is referred to in Com. Dig. *Droit*. (M. 2). Lord Raymond in his report, 2 Ld. Raym. at p. 1092, says: "The last day of term, Holt, C. J., delivered the opinion of the Court that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; that they did not go upon the *solebat*, or the *jure debuit reparari*, as if it were enough to say that the plaintiff had a house and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. . . . The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbor's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbor. . . . So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbor, and the reason of these cases is because every man must so use his own as not to damnify another." Salkeld, who had been counsel in the case, reports the judgment much more concisely (1 Salk. 361), but to the same effect; he says: "The reason he gave for his judgment was because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbor, and that it was a trespass on his neighbor, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbor's, . . . he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." It is worth noticing how completely the reason of Lord Holt corresponds with that of Brian, C. J., in the cases already cited in 20 Ed. 4. Martin, B., in the Court below says that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will show that it was because Lord Holt and his colleagues thought (no matter for this purpose whether rightly or wrongly) that the liability was not admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does therefore seem to us to be a very weighty authority

in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung on his premises, must at his peril prevent it from getting on his neighbor's, or make good all the damage which is the natural consequence of its doing so. No case has been found in which the question as to the liability for noxious vapors escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they at great expense erected contrivances by which the fumes of chlorine were condensed and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighborhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised the answer would probably have been that the uniform course of pleading in actions on such nuisances is to say that the defendant caused the noisome vapors to arise on his premises, and suffered them to come on the plaintiff's, without stating that there was any want of care or skill in the defendant, and that the case of *Tenant v. Goldwin*, *supra*, showed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief. What is said by Gibbs, C. J., in *Sutton v. Clarke*, 6 Taunt. 44 (E. C. L. R. vol. 1), though not necessary for the decision of the case, shows that that very learned judge took the same view of the law that was taken by Lord Holt. But it was further said by Martin, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger, *Hammack v. White*, 11 C. B. n. s. 588 (E. C. L. R. vol.

103); 31 L. J. (C. P.) 129; or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering: *Scott v. London Dock Company*, 3 H. & C. 596; 35 L. J. (Ex.) 17, 220; and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the license of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in the case [pp. 268-269].

We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle the case may be mentioned again.

Judgment for the plaintiff.

Rylands and Horrocks brought error to the House of Lords against the judgment of the Exchequer Chamber, which had reversed the judgment of the Court of Exchequer.

July, 1868. *Sir R. Palmer*, Q. C., and *T. Jones*, Q. C., for the original defendants, now plaintiffs in error.

Manisty, Q. C., and *J. A. Russell*, Q. C., for the plaintiff below, now defendant in error.

[Arguments omitted.]

THE LORD CHANCELLOR (Lord Cairns). My Lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants

are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had

passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of *Smith v. Kenrick*, in the Court of Common Pleas, 7 C. B. 515 (E. C. L. R. vol. 62).

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable. As the case of *Smith v. Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird v. Williamson*, 15 C. B. n. s. 317 (E. C. L. R. vol. 109), which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made

unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench."

My Lords, in that opinion I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH. My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond (Sir T. Raym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti, suo ut non lædat alienum*. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of *Smith v. Kenrick*, *supra*, and *Baird v. Williamson*, *supra*. In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The

damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water in that case was only left by the defendant to flow in its natural course.

But in the later case of *Baird v. Williamson*, the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in *Smith v. Kenrick*, the person working the mine under the close in which the reservoir was made had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Judgment of the Court of Exchequer Chamber affirmed.

NICHOLS v. MARSLAND.

1875. *Law Reports 10 Exchequer*, 255.

NICHOLS v. MARSLAND.

1876. *Law Reports, 2 Exchequer Division* 1.

THE plaintiff sued as the surveyor for the County of Chester of bridges repairable at the expense of the county.

The first count of the declaration alleged that the defendant was possessed of lands and of artificial pools constructed thereon for receiving and holding, and wherein were kept, large quantities of water, yet the defendant took so little and such bad care of the pools and the water therein that large quantities of water escaped from the pools and destroyed four county bridges, whereby the inhabitants of the county incurred expense in repairing and rebuilding them.

The second count alleged that the defendant was possessed of large quantities of water collected and contained in three artificial pools of the defendant near to four county bridges, and stated the breach as in the first count.

Plea, not guilty, and issue thereon.

At the trial before COCKBURN, C. J., at the Chester Summer Assizes, 1874, the plaintiff's witnesses gave evidence to the following effect: The defendant occupied a mansion-house and grounds at Henbury, in the County of Chester. A natural stream called Bagbrook, which rose in higher lands, ran through the defendant's grounds, and after leaving them flowed under the four county bridges in question. After entering the defendant's grounds the stream was diverted and dammed up by an artificial embankment into a pool of three acres in area called "the upper pool," from which it escaped over a weir in the embankment, and was again similarly dammed up by an artificial embankment into the "middle pool," which was between one and two acres in area. Escaping over a weir in the embankment, it was again dammed up into "the lower pool," which was between eight and nine acres in area, and from which the stream escaped into its natural and original course.

About five o'clock P. M. on the 18th of June, 1872, occurred a terrible thunder storm, accompanied by heavy rain, which continued till about three o'clock A. M. on the 19th. The rainfall was greater and more violent than any within the memory of the witnesses, and swelled the stream both above and in the defendant's grounds. On the morning of the 19th it was found that during the night the violence and volume of the water had carried away the artificial embankments of the three pools, the accumulated water in which, being thus suddenly let loose, had swelled the stream below the pools so that it carried away and

destroyed the county bridges mentioned in the declaration. At the pools were paddles for letting off the water, but for several years they had been out of working order.

Some engineers and other witnesses gave evidence that in their opinion the weir in the upper pool was far too small for a pool of that size, and that the mischief happened through the insufficiency of the means for carrying off the water. It was not proved when these ornamental pools were constructed, but it appeared that they had existed before the defendant began to occupy the property, and that no similar accident had ever occurred within the knowledge of the witnesses.

After hearing the address of the defendant's counsel, the jury said they did not wish to hear his witnesses, and that in their opinion the accident was caused by *vis major*. In answer to Cockburn, C. J., they found that there was no negligence in the construction or maintenance of the works, and that the rain was most excessive. Cockburn, C. J., being of opinion that the rainfall, though extraordinary and unprecedented, did not amount to *vis major* or excuse the defendant from liability, entered the verdict for the plaintiff for 4092*l.*, the agreed amount, reserving leave to the defendant to move to enter it for her if the Court (who were to draw inferences of fact) should be of opinion that the rainfall amounted to *vis major*, and so distinguished the case from *Rylands v. Fletcher*, L. R. 3 H. L. 330.

A rule *nisi* having been accordingly obtained to enter the verdict for the defendant on the ground that there was no proof of liability, the plaintiff on showing cause to be at liberty to contend that a new trial should be granted on the ground that the finding of the jury was against the weight of evidence —

May 27. *McIntyre*, Q. C., and *Coxon*, for the plaintiff, showed cause. The defendant, having for her own purposes and advantage stored a dangerous element on her premises, is liable if that element escapes and injures the property of another, even though the escape be caused by an earthquake or any form of *vis major*.

[CLEASBY, B. Was not the flood brought on to the defendant's land by *vis major*?]

The pools were made by those through whom the defendant claims, and if there had been no pools the water of the natural stream would have escaped without doing injury. The case falls within the rule laid down by the judgment in *Fletcher v. Rylands*, L. R. 1 Ex. 265, 279, delivered by Blackburn, J.: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major*, or the act of God." This passage was cited with approval by Lord Cairns, C., and Lord Cranworth on appeal. L. R. 3 H. L. 330, 339, 340.

[CLEASBY, B. There the defendant brought the water on to his own land. Not so here.]

The intimation that *vis major* would perhaps be an excuse is not confirmed by any decision or any other *dictum*. But the facts here do not amount to *vis major*. If the weirs had been larger, or the banks stronger, the mischief would not have happened. *Vis major* means something which cannot be foreseen or resisted, as an earthquake or an act of the Queen's enemies.

Hughes and Dunn (*Sir J. Holker*, S. G., with them), in support of the rule, cited Broom's Legal Maxims, 5th ed. p. 230: "The act of God signifies in legal phraseology any inevitable accident occurring without the intervention of man, and may indeed be considered to mean something in opposition to the act of man, as storms, tempests, and lightning: *per* Mansfield, C. J., in *Forward v. Pittard*, 1 T. R. 33; *Trent Navigation v. Wood*, 3 Esp. 131; *Rex v. Somerset*, 8 T. R. 312." Also *Amies v. Stevens*, 1 Str. 127; *Smith v. Fletcher*, L. R. 9 Ex. 64; *May v. Burdett*, 9 Q. B. 101; and *Jackson v. Smithson*, 15 M. & W. 563.

[The question of the verdict being against the evidence was then argued.] *Cur. adv. vult.*

June 12. The judgment of the Court (KELLY, C. B., BRAMWELL, and CLEASBY, BB.) was read by

BRAMWELL, B. In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*. No doubt, as was said by Mr. McIntyre, a shower is the act of God as much as a storm; so is an earthquake in this country: yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or *vis major*. No doubt not the act of God or a *vis major* in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community.

So understanding the finding of the jury, I am of opinion the defendant is not liable. What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any

London house, and the water did mischief to a neighbor, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? Mr. McIntyre contended that she would be in all cases of the water being let out, whether by a stranger or the Queen's enemies, or by natural causes, as lightning or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes; in the case of the chimneys some one has put a ton of bricks fifty feet high for his own purposes; both equally harmless if they stay where placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion: both have the same property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbor's land and cause it to do damage; or a field of ripe wheat, which might be fired by lightning and do mischief.

I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control.

This case differs wholly from *Fletcher v. Rylands*, L. R. 1 Ex. 265, 279. There the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district and so adapting it for habitation. I refer to my judgment [3 H. & C. 788; 34 L. J. (Ex.) 181] in *Fletcher v. Rylands*, and I repeat that here the plaintiff had no right that has been infringed, and the defendant has done no wrong. The plaintiff's right is to say to the defendant, *Sic utere tuo ut alienum non lædas*, and that the defendant has done, and no more.

The CHIEF BARON and my brother CLEASBY agree in this judgment. As to the plaintiff's application for a new trial on the ground that the finding of the jury is against evidence, we have spoken to Cockburn, C. J.; he is not dissatisfied therewith, and we cannot see it is wrong. Consequently the rule will be absolute to enter a verdict for the defendant.

Rule absolute.

In Court of Appeal.

Cotton, Q. C. (*McIntyre*, Q. C., and *Coxon* with him), for the plaintiff, appellant.¹

Assuming the jury to be right in finding that the defendant was not guilty of negligence, and that the rainfall amounted to *vis major*, or the act of God, still the defendant is liable because she has, without necessity and voluntarily for her own pleasure, stored on her premises an element which was liable to be let loose, and which, if let loose, would be dangerous to her neighbors. Even if she be considered innocent of wrong-doing, why should the plaintiff suffer for the defendant's voluntary act of turning an otherwise harmless stream into a source of danger? But for the defendant's embankments, the excessive rainfall would have escaped without doing injury.

Gorst, Q. C., and *Hughes* (*Dunn* with them), for defendant, cited *Carstairs v. Taylor*, L. R. 6 Ex. 217; *McCoy v. Danbey*, 20 Penn. State, 85; *Tennent v. Earl of Glasgow*, 1 Court of Session Cases, 3d series, 133.

The judgment of the Court (COCKBURN, C. J., JAMES, and MELLISH, L. JJ., and BAGGALLAY, J. A.) was read by

MELLISH, L. J. This was an action brought by the county surveyor [under 43 Geo. 3 c. 59, s. 4] of the County of Chester against the defendant to recover damages on account of the destruction of four county bridges which had been carried away by the bursting of some reservoirs. At the trial before Cockburn, C. J., it appeared that the defendant was the owner of a series of artificial ornamental lakes, which had existed for a great number of years, and had never, previous to the 18th day of June, 1872, caused any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed, the dams at their end gave way, and the water out of the lakes carried away the county bridges lower down the stream. The jury found that there was no negligence either in the construction or the maintenance of the reservoirs, but that if the flood could have been anticipated, the effect might have been prevented.² Upon this finding the Lord Chief Justice, acting on the decision in *Rylands v. Fletcher*, L. R. 3 H. L. 330, as the nearest authority applicable to the case, directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. The Court of Exchequer have ordered the verdict to be entered for the defendant, and from their decision an appeal has been brought before us.

The appellant relied upon the decision in the case of *Rylands v. Fletcher*, *supra*. In that case the rule of law on which the case was decided was thus laid down by Mr. Justice Blackburn in the Exchequer

¹ Argument abridged.

² The judgment of the Court below, read by BRAMWELL, B., states the finding thus: "In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*."

Chamber [L. R. 1 Ex. 279]: "We think the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. . . . He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of the sort exists here it is unnecessary to inquire what excuse would be sufficient." It appears to us that we have two questions to consider: First, the question of law, which was left undecided in *Rylands v. Fletcher*, *supra*, — Can the defendant excuse herself by showing that the escape of the water was owing to *vis major*, or, as it is termed in the law books, the "act of God?" And, secondly, if she can, did she in fact make out that the escape was so occasioned?

Now, with respect to the first question, the ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more — as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbor — the case of *Rylands v. Fletcher*, *supra*, establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. . . . But the present case is distinguished from that of *Rylands v. Fletcher*, *supra*, in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in con-

ducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God.

The remaining question is, did the defendant make out that the escape of the water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate. In the late case of *Nugent v. Smith*, 1 C. P. D. 423, we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it.

It was indeed ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow.

On the whole we are of opinion that the judgment of the Court of Exchequer ought to be affirmed.

*Judgment affirmed.*¹

BOX v. JUBB ET AL.

1879. *Law Reports, 4 Exchequer Division*, 76.²

CASE stated in an action brought in the County Court of Yorkshire, holden at Bradford, to recover damages by reason of the overflowing of a reservoir of the defendants.

¹ The question whether the rule should be made absolute for a new trial, on the ground that the verdict was against the evidence, was reserved for future discussion, if the plaintiff should desire it.

² Arguments omitted. — Ed.

1. The defendants are the owners and occupiers of a woollen cloth-mill situate at Batley, in the county of York, and for the necessary supply of water to the mill is a reservoir, also belonging to the defendants. Such mill and reservoir have been built, and constructed, and used, as at the time of the overflowing of the reservoir hereinafter mentioned, for many years.

2. The plaintiff is the tenant of premises adjoining the reservoir.

3. The reservoir is supplied with water from a main drain or watercourse. The surplus water from the reservoir passes through an outlet into the main drain or watercourse. The inlet and outlet are furnished with proper doors or sluices, so as (when required) to close the communications between the reservoir and the main drain or watercourse.

4. The whole of the premises are within the borough of Batley, and the defendants have the right to use the main drain or watercourse by obtaining a supply of water therefrom and discharging their surplus-water thereinto, as hereinbefore stated, but have otherwise no control over the drain or watercourse, which does not belong to them.

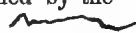
5. In the month of December, 1877, the plaintiff's premises were flooded by reason of the overflowing of the defendants' reservoir.

6. Such overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third party, into the main drain or watercourse at a point considerably above the defendants' premises, and by an obstruction in the main drain or watercourse below the outlet of the defendants' reservoir, whereby the water from such main drain or watercourse was forced through the doors or sluices (which were closed at the time) into the defendants' reservoir.

7. Such obstruction was caused by circumstances over which the defendants had no control, and without their knowledge; and had it not been for such obstruction the overflowing of the reservoir would not have happened.

8. The defendants' reservoir, and the communications between it and the main drain or watercourse, and the doors or sluices, are constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances.

9. No negligence or wrongful act is attributable to either party.

Under the circumstances the judge of the County Court was of opinion that the defendants were liable for the damage sustained by the plaintiff, and accordingly gave judgment for the plaintiff. 

The question for the opinion of the Court, having regard to the facts set out in the case, was whether the defendants were liable for the damage sustained by the plaintiff by reason of the flooding of his premises, such flooding being caused by water from a reservoir belonging to a third party, over which the defendants had no control, and without any knowledge or negligence on defendants' part, the overflowing of the defendants' reservoir being occasioned by the act of a third party, over whom the defendants had no control, and no wrongful act or negligence being attributable to the defendants, and the direct cause

of the damage being the obstruction in the main drain or watercourse, which was caused by circumstances over which the defendants had no control and without their knowledge.

Gully, Q. C. (*George C. Thompson*, with him), for defendants.

Bray, for plaintiff.

KELLY, C. B. I think this judgment must be reversed. The case states that for many years the defendants have been possessed of a reservoir to which there are gates or sluices. There has been an overflow from the reservoir which has caused damage to the plaintiff. The question is, what was the cause of this overflow? Was it anything for which the defendants are responsible — did it proceed from their act or default, or from that of a stranger over which they had no control? The case is abundantly clear on this, proving beyond a doubt that the defendants had no control over the causes of the overflow, and no knowledge of the existence of the obstruction. The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called *vis major* or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose. The judgment must be entered for the defendants.

POLLOCK, B. I also think the defendants are entitled to judgment. Looking at the facts stated, that the defendants had no control over the main drain, and no knowledge of or control over the obstruction, apart from the cases, what wrong have the defendants done for which they should be held liable? The case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, is quite distinguishable. The case of *Nichols v. Marsland*, L. R. 10 Ex. 255, 14 Eng. R. 538, is more in point. The illustrations put in that case clearly go to show that if the person who has collected the water has done all that skill and judgment can do he is not liable for damage by acts over which he has no control. In the judgment of the Court of Appeal, 2 Ex. D. 1, at p. 5, Mellish, L. J., adopts the principle laid down by this Court. He says: "If indeed the damages were occasioned by the act of the party without more — as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil the water escapes and does damage to his neighbor — the case of *Rylands v. Fletcher*, *supra*, establishes that he must be held liable." Here this water has not been accumulated by the defendants, but has come from elsewhere and added to that which was properly and safely there. For this the defendants, in my opinion, both on principle and authority, cannot be held liable.

*Judgment for the defendants.*¹

¹ Leave to appeal was refused.

MARSHALL v. WELWOOD ET AL.

1876. 38 *New Jersey Law Reports* (9 *Vroom*), 339.

Surt for damages done to the property of the plaintiff by the bursting of the boiler of a steam-engine on the adjoining property of the defendant Welwood. Garside, the other defendant, had sold this boiler to Welwood, and was experimenting with it at the time of the explosion.

The case came before the Court on a motion for a new trial, the verdict having gone for the plaintiff against both defendants.

Argued at February Term, 1876, before BEASLEY, C. J., and WOODHULL, VAN SYCKEL, and SCUDDER, JJ.

For the motion, *J. B. Vredenburg*.

The opinion of the Court was delivered by

BEASLEY, C. J. The judge, at the trial of this cause, charged, among other matters, that as the evidence incontestably showed that one of the defendants, Welwood, was the owner of the boiler which caused the damage, he was liable in the action, unless it appeared that the same was not being run by him, or his agent, at the time of the explosion. The proposition propounded was, that a person is responsible for the immediate consequences of the bursting of a steam boiler, in use by him, irrespective of any question as to negligence or want of skill on his part.

This view of the law is in accordance with the principles maintained, with great learning and force of reasoning, in some of the late English decisions. In this class the leading case was that of *Fletcher v. Rylands*, L. R. 1 Exch. 265, which was a suit on account of damage done by water escaping on to the premises of the plaintiff from a reservoir which the defendant had constructed, with due care and skill, on his own land. The judgment was put on a general ground, for the Court said: "We think the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This result was deemed just, and was sought to be vindicated on the theory that it is but reasonable that a person who has brought something on his own property, which was not naturally there, harmless to others, so long as it is confined to his own property, but which he knows to be mischievous, if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. This principle would evidently apply to, and rule, the present case: for water is no more likely to escape from a reservoir and do damage, than steam is from a boiler; and, therefore, if he who collects the former force upon his property, and seeks, with care and

skill, to keep it there, is answerable for his want of success, so is he who, under similar conditions, endeavors to deal with the latter. There is nothing unlawful in introducing water into a properly constructed reservoir on a person's own land, nor raising steam in a boiler of proper quality; neither act, when performed, is a nuisance *per se*; and the inquiry consequently is, whether in the doing of such lawful act the party who does it is an insurer against all flaws in the apparatus employed, no matter how secret, or unascertainable by the use of every reasonable test, such flaws may be. This English adjudication takes the affirmative side of the question, conceding, however, that the subject is not controlled by any express decision, and that it is to be investigated with reference to the general grounds of jurisprudence. I have said the doctrine involved has been learnedly treated, and the decision is of great weight, and yet its reasoning has failed to convince me of the correctness of the result to which it leads, and such result is clearly opposed to the course which judicial opinion has taken in this country. The fallacy in the process of argument by which judgment is reached in this case of *Fletcher v. Rylands*, appears to me to consist in this: that the rule mainly applicable to a class of cases which, I think, should be regarded as, in a great degree, exceptional, is amplified and extended into a general, if not universal, principle. The principal instance upon which reliance is placed is the well-known obligation of the owner of cattle, to prevent them from escaping from his land and doing mischief. The law as to this point is perfectly settled, and has been settled from the earliest times, and is to the effect, that the owner must take charge of his cattle at his peril, and if they evade his custody he is, in some measure, responsible for the consequences. This is the doctrine of the Year Books, but I do not find that it is grounded in any theoretical principle, making a man answerable for his acts or omissions, without regard to his culpability. That in this particular case of escaping cattle so stringent an obligation upon the owner should grow up, was not unnatural. That the beasts of the land-owner should be successfully restrained, was a condition of considerable importance to the unmolested enjoyment of property, and the right to plead that the escape had occurred by inevitable accident would have seriously impaired, if it did not entirely frustrate, the process of distress damage feasant. Custom has had much to do in giving shape to the law, and what is highly convenient readily runs into usage, and is accepted as a rule. It would but rarely occur that cattle would escape from a vigilant owner, and in this instance such rare exceptions seem to have passed unnoticed, for there appears to be no example of the point having been presented for judicial consideration; for the conclusion of the liability of the unnegligent owner rests in *dicta*, and not in express decision. But waiving this, there is a consideration which seems to me to show that this obligation which is put upon the owner of errant cattle should not be taken to be a principle applicable, in a general way, to the use or ownership of property,

which is this: that the owner of such cattle is, after all, liable only *sub modo* for the injury done by them, that is, he is reponsible, with regard to tame beasts who have no exceptionally vicious disposition so far as is known, for the grass they eat, and such like injuries, but not for the hurt they may inflict upon the person of others, — a restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose lawful acts produce, without fault in them, and in an indirect manner, ill results which disastrously affect innocent persons. If the principle ruling these cases was so broad as this, conformity to it would require that the person being the cause of the mischief should stand as an indemnifier against the whole of the damage. It appears to me, therefore, that this rule, which applies to damage done by straying cattle, was carried beyond its true bounds, when it was appealed to [in] proof that a person in law is answerable for the natural consequences of his acts, such acts being lawful in themselves, and having been done with proper care and skill.

The only other cases which were referred to in support of the judgment under consideration were those of one who was sued for not keeping the wall of his privy in repair, to the detriment of his neighbor, being the case of *Tenant v. Goulding*, 1 Salk. 21, and several actions which it is said had been brought against the owners of some alkali works for damages alleged to have been caused by the chlorine fumes escaping from their works [which], the case showed, had been erected upon the best scientific principles. But I am compelled to think that these cases are but a slender basis for the large structure put upon it. The case of *Tenant v. Goulding* presented merely the question whether a landowner is bound in favor of his neighbor to keep the wall of his privy in repair, and the Court held that he was, and that he was responsible if, for want of such reparation, the filth escaped on the adjoining land. No question was mooted as to his liability in case the privy had been constructed with care and skill with a view to prevent the escape of its contents, and had been kept in a state of repair. Not to repair a receptacle of this kind when it was in want of repairs was, in itself, a *prima facie* case of negligence, and it seems to me that all the Court decided was to hold so.

But this consideration is also to be noticed, both with respect to this last case, and that of the injurious fumes from the alkali works, that in truth they stand somewhat by themselves, and having this peculiarity: that the things in their nature partake largely of the character of nuisances. Take the alkali works as an example. Placed in a town, under ordinary circumstances, they would be a nuisance. When the attempt is made by scientific methods to prevent the escape of the fumes, it is an attempt to legalize that which is illegal, and the consequence is, it may well be held that, failing in the attempt, the nuisance remains.

I cannot agree that, from these indications, the broad doctrine is to

be drawn that a man in law is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. The decisions cited are not so much examples of legal maxims as of exceptions to such maxims; for they stand opposed, and in contrast to principles, which it seems to me must be considered much more general in their operation and elementary in their nature.

The common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damage complained of must have come from a wrongful act. Mr. Addison, in his work on Torts, Vol. I., p. 3, very correctly states this rule. He says: "A man may, however, sustain grievous damage at the hands of another, and yet, if it be the result of inevitable accident, or a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action of damages." Among other examples, he refers to an act of force, done in necessary self-defence, causing injury to an innocent bystander, which he characterizes as *damnum sine injuria*,—"for no man does wrong or contracts guilt in defending himself against an aggressor." Other instances of a like kind are noted; such as the lawful obstruction of the view from the windows of dwelling-houses; or the turning aside, to the detriment of another, the current of the sea or river, by means of walls or dikes. Many illustrations, of the same bearing, are to be found scattered through the books of reports. Thus, Dyer, 25 b, says: "That if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing." This case belongs to a numerous, well-known class, where animals which are usually harmless do damage, the decisions being that, under such conditions, the owners of the animals are not responsible. Akin to these in principle are cases of injuries done to innocent persons by horses in the charge of their owners, becoming ungovernable by reason of unexpected causes; or where a person in a dock was struck by the falling of a bale of cotton which the defendants' servants were lowering, *Scott v. London Dock Co.*, 3 H. & C. 596; or in cases of collision, either on land or sea. *Hammack v. White*, 11 C. B. (N. S.) 588.

It is true that these cases of injury done to personal property, or to persons, are, in the case of *Fletcher v. Rylands*, sought to be distinguished from other damages, on the ground that they are done in the course of traffic on the highways, whether by land or sea, which cannot be conducted without exposing those whose persons or property are near it to some inevitable risk. But this explanation is not sufficiently comprehensive, for, if a frightened horse should, in his flight, break into an inclosure, no matter how far removed from the highway, the owner would not be answerable for the damage done.¹ Nor is the reason upon which it rests satisfactory, for, if traffic cannot be carried on

¹ See *Brown v. Collins*, 16 Am. Rep. 372 and note.

without some risk, why can it not be said with the same truth, that the other affairs of life, though they be transacted away from the highways, cannot be carried on without some risk; and if such risk is, in the one case, to be borne by innocent persons, why not in the other? Business done upon private property may be a part of traffic as well as that done by the means of the highway, and no reason is perceived why the same favor is not to be extended to it in both situations. But, besides this, the reason thus assigned for the immunity of him who is the unwilling producer of the damage has not been the ground on which the decisions illustrative of the rule have been put; that ground has been that the person sought to be charged had not done any unlawful act. Everywhere, in all the branches of the law, the general principle that blame must be imputable as a ground of responsibility for damage proceeding from a lawful act, is apparent. A passenger is injured by the breaking of an axle of a public conveyance; the carrier is not liable, unless negligence can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host, without proof that he knew, or ought to have known of the existence of the danger.¹ If the steam-engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded, and had inflicted injuries on travellers or bystanders, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskillfulness. By changing the place of the accident to private property, I cannot agree that a different rule obtains.

It seems to me, therefore, that in this case it was necessary to submit the matter, as a question of fact for the jury, whether the occurrence doing the damage complained of, was the product of pure accident, or the result of want of care or skill on the part of the defendant or his agents.

This view of the subject is taken in the American decisions. A case, in all respects in point, is that of *Losee v. Buchanan*, 51 N. Y. 476; s. c., 10 Am. Rep. 623. The facts were essentially the same with those of the principal case. It was an action growing out of the explosion of a steam boiler upon private property, and the ruling was that such action could not be sustained without proof of fault or negligence. In that report the line of cases is so fully set out that it is unnecessary here to repeat them.

*The rule should be made absolute.*²

¹ See *Kendall v. Boston*, 19 Am. Rep. 446.

² See *St. Peter v. Dennison*, 17 Am. Rep. 258 and note.

BROWN v. COLLINS.

1873. 53 *New Hampshire*, 442.

TRESPASS, by Albert H. Brown against Lester Collins, to recover the value of a stone post on which was a street lamp, situated in front of his place of business in the village of Tilton. The post stood upon the plaintiff's land, but near the southerly line of the main highway leading through the village and within four feet of said line. There was nothing to indicate the line of the highway, nor any fence or other obstruction between the highway, as travelled, and the post. The highway crosses the railroad near the place of accident, and the stone post stood about fifty feet from the railroad track at the crossing. The defendant was in the highway, at or near the railroad crossing, with a pair of horses loaded with grain, going to the grist-mill in Tilton village. The horses became frightened by an engine on the railroad near the crossing, and by reason thereof became unmanageable, and ran, striking the post with the end of the pole and breaking it off near the ground, destroying the lamp with the post. No other injury was done by the accident. The shock produced by the collision with the post threw the defendant from his seat in the wagon, and he struck on the ground between the horses, but suffered no injury except a slight concussion. The defendant was in the use of ordinary care and skill in managing his team, until they became frightened as aforesaid.

The foregoing facts were agreed upon for the purpose of raising the question of the right of the plaintiff to recover in this action.

Rogers, for the plaintiff.

Barnard & Sanborn, for the defendant.

DOE, J. It is agreed that the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened; and that they then became unmanageable, and ran against and broke a post on the plaintiff's land. It is not explicitly stated that the defendant was without actual fault, — that he was not guilty of any malice, or unreasonable unskilfulness or negligence; but it is to be inferred that the fact was so; and we decide the case on that ground. We take the case as one where, without actual fault in the defendant, his horses broke from his control, ran away with him, went upon the plaintiff's land, and did damage there, against the will, intent, and desire of the defendant.

Sir Thomas Raymond's report of *Lambert & Olliot v. Bessey*, T. Raym. 421, and *Bessey v. Olliot & Lambert*, T. Raym. 467, is, "The question was this: A gaoler takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction, Whether the gaoler be liable to an action of false imprisonment? and the judges of the common

pleas did all hold that he was; and of that opinion I am, for these reasons.

“1. In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and therefore Mich. 6 E. 4. 7. a. pl. 18. *Trespass quare vi & armis clausum fregit, & herbam suam pedibus conculcando consumpsit* in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another, *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbor's house, and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and, in lifting it up, hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea*.

“Mich. 23. Car. 1. B. R. — Stile 72. *Guilbert versus Stone*. Trespass for entering his close, and taking away his horse. The defendant pleads, that he, for fear of his life, by threats of twelve men, went into the plaintiff's house, and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant, and make satisfaction to the plaintiff.

“Hob. 134, *Weaver versus Ward*. Trespass of assault and battery. The defendant pleads, that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant, with his musket, *casualiter & per infortunium & contra voluntatem suam* in discharging of his gun hurt the plaintiff; and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained. . . . But the three other judges resolved, that the defendant, the gaoler, could not be charged, because he could not have notice whether the prisoner was legally arrested or not.”

In *Fletcher v. Rylands*,¹ L. R. 3 H. L. 330, Lord Cranworth said: “In considering whether a defendant is liable to a plaintiff

¹ See *Cahill v. Eastman*, 18 Minn. 324, *Madras R. Co. v. Zemindar of Carvetinagarum*, decided July 3, 1874, 30 L. Times Rep. (N. S.) 770.—REPORTER.

for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond (Sir T. Raym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

The head-note of *Weaver v. Ward*, Hob. 134, is: "If one trained soldier wound another, in skirmishing for exercise, an action of trespass will lie, unless it shall appear from the defendant's plea that he was guilty of no negligence, and that the injury was inevitable." The reason of the decision, as reported, was this: "For though it were agreed, that if men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran across his piece when it was discharging; or had set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

There may be some ground to argue that "utterly without his fault," "inevitable," and "no negligence," in the sense intended in that case, mean no more than the modern phrase "ordinary and reasonable care and prudence;" and that, in such a case, at the present time, to hold a plea good that alleges the exercise of reasonable care, without setting forth all "the circumstances" or evidence sustaining the plea, would be substantially in compliance with the law of that case, due allowance being made for the difference of legal language used at different periods, and the difference in the forms of pleading. But the drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country. Formerly, in England, there seems to have been no well-defined test of an actionable tort. Defendants were often held liable "because," as Raymond says, "he that is damaged ought to be recompensed;" and not because, upon some clearly stated principle of law founded on actual culpability, public policy, or natural justice, he was entitled to compensation from the defendant. The law was supposed to regard "the loss and damage of the party suffering," more than the negligence and blameworthiness of the defendant: but how much more it regarded the former than the latter, was a question not settled, and

very little investigated. "The loss and damage of the party suffering," if without relief, would be a hardship to him; relief compulsorily furnished by the other party would often be a hardship to him; when and why the "loss and damage" should, and when and why they should not, be transferred from one to the other, by process of law, were problems not solved in a philosophical manner. There were precedents, established upon superficial, crude, and undigested notions; but no application of the general system of legal reason to this subject.

Mr. Holmes says: "It may safely be stated that all the more ancient examples are traceable to conceptions of a much ruder sort (than actual fault), and in modern times "to more or less definitely thought-out views of public policy. The old writs in trespass did not allege, nor was it necessary to show, anything savoring of culpability. It was enough that a certain event had happened, and it was not even necessary that the act should be done intentionally, though innocently. An accidental blow was as good a cause of action as an intentional one. On the other hand, when, as in *Rylands v. Fletcher*, modern courts hold a man liable for the escape of water from a reservoir which he has built upon his land, or for the escape of cattle, although he is not alleged to have been negligent, they do not proceed upon the ground that there is an element of culpability in making such a reservoir, or in keeping cattle, sufficient to charge the defendant as soon as a *damnum* occurs, but on the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders." He alludes to the fact that "there is no certainty what will be thought extra-hazardous in a certain jurisdiction at a certain time," but suggests that many particular instances point to the general principle of liability for the consequences of extra-hazardous undertakings as the tacitly assumed ground of decision. 7 Am. Law Rev. 652, 653, 662; 2 Kent Com. (12th ed.) 561, n. 1; 4 *id.* 110, n. 1. If the hazardous nature of things or of acts is adopted as the test, or one of the tests, and the English authorities are taken as the standard of what is to be regarded as hazardous, "it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbour's property from anything done upon his own land" (Mellish's argument in *Fletcher v. Rylands*, L. R. 1 Ex. 272), and that an individual is answerable "who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor, if he thereby unwittingly injure his neighbor" — Gibbs, C. J., in *Sutton v. Clarke*, 6 Taunt. 44, approved by Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Ex. 286. If danger is adopted as a test, and the English authorities are abandoned, the fact of danger, controverted in each case, will present a question for the jury, and expand the issue of tort or no tort into a question of reasonableness, in a form much broader than has been generally used; or courts will be left to

devise tests of peril, under varying influences of time and place that may not immediately produce a uniform, consistent, and permanent rule.

It would seem that some of the early English decisions were based on a view as narrow as that which regards nothing but the hardship "of the party suffering;" disregards the question whether, by transferring the hardship to the other party, anything more will be done than substitute one suffering party for another; and does not consider what legal reason can be given for relieving the party who has suffered, by making another suffer the expense of his relief. For some of those decisions, better reasons may now be given than were thought of when the decisions were announced: but whether a satisfactory test of an actionable tort can be extracted from the ancient authorities, and whether the few modern cases that carry out the doctrine of those authorities as far as it is carried in *Fletcher v. Rylands* (3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330; L. R. (Phil. ed.) 3 Ex. 352), can be sustained, is very doubtful. The current of American authority is very strongly against some of the leading English cases.

One of the strongest presentations of the extreme English view is by Blackburn, J., who says, in *Fletcher v. Rylands*, L. R. 1 Ex. 279, 280, 281, 282: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damned without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench. The case that has most commonly occurred, and which is most frequently to be found in the

books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law, as to them, seems to be perfectly settled from early times: the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape, — that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore [or he might have added, dogs to bite], — but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too. . . . In these latter authorities [relating to animals called mischievous or ferocious], the point under consideration was damage to the person; and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. . . . There does not appear to be any difference, in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stench, or any other thing, which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor."

This seems to be substantially an adoption of the early authorities, and an extension of the ancient practice of holding the defendant liable, in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damage to the defendant. The ancient rule was, that a person in whose house, or on whose land, a fire accidentally originated, which spread to his neighbor's property and destroyed it, must make good the loss. *Filliter v. Phippard*, 11 A. & E. (N. S.) 347, 354; *Tubervil v. Stamp*, 1 Comyns, 32; s. c., 1 Salk. 13; Com. Dig., *Action upon the case for Negligence* (A 6.); 1 Arch. N. P. 539; *Fletcher v. Rylands*, 3 H. & C. 790, 793; *Russell v. Fabyan*, 34 N. H. 218, 225. No inquiry was made into the reason of putting upon him his neighbor's loss as well as his own. The rule of such cases is applied, by Blackburn, to everything which a man brings on his land, which will, if it escape, naturally do damage. One result of such a doctrine is, that every one building a fire on his own hearth, for necessary purposes, with the utmost care, does so at the peril, not only of losing his own house, but of being irretrievably ruined if a spark from his chimney starts a conflagration which lays waste the neighborhood. "In conflict with the rule, as laid down in the English cases, is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely

to produce mischief if it escapes and goes beyond control ; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises, and does him damage without proof of negligence." *Losee v. Buchanan*, 51 N. Y. 476, 487.

Everything that a man can bring on his land is capable of escaping, — against his will, and without his fault, with or without assistance, in some form, solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art, — and of doing damage after its escape. Moreover, if there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things ; it must be applied to all his acts that disturb the original order of creation ; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential elements of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems to be man's duty carefully to do. The distinction made by Lord Cairns, *Rylands v. Fletcher*, L. R. 3 H. L. 330, between a natural and a non-natural use of land, if he meant anything more than the difference between a reasonable use and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law : it would impose a penalty upon efforts, made in a reasonable, skilful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in general, legal rights ; and the rights of civilization are, in a legal sense, as natural as any others. " Most of the rights of property, as well as of person, in the social state, are not absolute but relative," *Losee v. Buchanan*, 51 N. Y. 485 ; and, if men ever were in any other than the social state, it is neither necessary nor expedient that they should now govern themselves on the theory that they ought to live in some other state. The common law does not usually establish tests of responsibility on any other basis than the propriety of their living in the social state, and the relative and qualified character of the rights incident to that state.

In *Fletcher v. Rylands*, L. R. 1 Ex. 286, 287, Mr. Justice Blackburn, commenting upon the remark of Mr. Baron Martin, " that, when damage is done to personal property, or even to the person,

by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible," says, — "This is no doubt true; and, as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger, *Hammack v. White*, 11 C. B. n. s. 588, 31 L. J. (C. P.) 129; or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering, *Scott v. London Docks Company*, 3 H. & C. 596, 35 L. J. (Ex.) 17, 220; and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what, *prima facie*, was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself." This would be authority for holding, in the present case, that the plaintiff, by having his post near the street, took upon himself the risk of its being broken by an inevitable accident carrying a traveller off the street. But such a doctrine would open more questions, and more difficult ones, than it would settle. At what distance from a highway would an object be near it? What part of London is not near a street? And then, as the defendant had as good a right to be at home with his horses as to be in the highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of an inevitable accident happening by reason of the country being inhabited, as to assume a highway risk by living near a road? If neighborhood is the test, who are a man's neighbors but the whole human race? If a person, by remaining in England, is held to take upon himself one class of the inevitable dangers of that country because he could avoid that class by migrating to a region of solitude, why should he not, for a like reason, also be held to expose himself voluntarily to other classes of the inevitable dangers of that country? And where does this reasoning end?

It is not improbable that the rules of liability for damage done by brutes or by fire, found in the early English cases, were introduced by sacerdotal influence, from what was supposed to be the Roman or the

Hebrew law. 7 Am. L. Rev. 652, *note*; 1 Domat Civil Law (Strahan's translation, 2d ed.) 304, 305, 306, 312, 313; Exodus xxi: 28-32, 36; xxii: 5, 6, 9. It would not be singular if these rules should be spontaneously produced at a certain period in the life of any community. Where they first appeared is of little consequence in the present inquiry. They were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped state of agriculture, manufactures, and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends. They were introduced when the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade, and productive enterprise, — when the common law had not been set forth in the precedents, as a coherent and logical system on many subjects other than the tenures of real estate. At all events, whatever may be said of the origin of those rules, to extend them, as they were extended in *Rylands v. Fletcher*, seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the present case would be contrary to American authority as well as to our understanding of legal principles.

The difficulty under which the plaintiff might labor in proving the culpability of the defendant, — which is sometimes given as a reason for imposing an absolute liability without evidence of negligence, — *Rixford v. Smith*, 52 N. H. 355, 359, or changing the burden of proof, *Lisbon v. Lyman*, 49 N. H. 553, 568, 569, 574, 575, seems not to have been given in the English cases relating to damage done by brutes or fire. And, however large or small the class of cases in which such a difficulty may be the foundation of a rule of law, since the difficulty has been so much reduced by the abolition of witness disabilities, the present case is not one of that class.

There are many cases where a man is held liable for taking, converting (*C. R. Co. v. Foster*, 51 N. H. 490) or destroying property, or doing something else, or causing it to be done, intentionally, under a claim of right, and without any actual fault. "Probably one half of the cases in which trespass *de bonis asportatis* is maintained, arise from a mere misapprehension of legal rights." Metcalf, J., in *Stanley v. Gaylord*, 1 Cush. 536, 551. When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted, and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act; or by an act of which he knew, or ought to have known, the damage would be a

necessary, probable, or natural consequence; or by an act which he knew or ought to have known, to be unlawful, — we understand the general rule to be, that he is not liable. *Vincent v. Stinehour*, 7 Vt. 62; *Aaron v. State*, 31 Ga. 167; *Morris v. Platt*, 32 Conn. 75; and Judge Redfield's note to that case in 4 Am. L. Reg. (n. s.) 532; Townshend on Slander, secs. 67, 88, p. 128, n. 1 (2d ed.). In *Brown v. Kendall*, 6 Cush. 292, the defendant, having interfered to part his dog and the plaintiff's which were fighting, in raising a stick for that purpose accidentally struck the plaintiff, and injured him. It was held, that parting the dogs was a lawful and proper act which the defendant might do by the use of proper and safe means; and that if the plaintiff's injury was caused by such an act done with due care and all proper precautions, the defendant was not liable. In the decision, there is the important suggestion that some of the apparent confusion in the authorities has arisen from discussions of the question whether a party's remedy is in trespass or case, and from the statement that when the injury comes from a direct act, trespass lies, and when the damage is consequential, case is the proper form of action, — the remark concerning the immediate effect of an act being made with reference to damage for which it is admitted there is a remedy of some kind, and on the question of the proper remedy, not on the general question of liability. Judge Shaw, delivering the opinion of the court, said: "We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev., secs. 85 to 92; *Wakeman v. Robinson*, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis v. Saunders*, 2 Chit. R. 639; Com. Dig. *Battery*, A. (Day's ed.) and notes; *Vincent v. Stinehour*, 7 Vt. 62;" *James v. Campbell*, 5 C. & P. 372; *Alderson v. Waistell*, 1 C. & K. 358.

Whatever may be the rule or the exception, or the reason of it, in cases of insanity, *Weaver v. Ward*, Hob. 134; Com. Dig. *Battery*, A. note d, Hammond's ed.; *Dormay v. Borradaile*, 5 M. G. & S. 380; Sedgwick on Damages, 455, 456, 2d ed.; *Morse v. Crawford*, 17 Vt. 499; *Dickinson v. Barber*, 9 Mass. 225; *Krom v. Schoonmaker*, 3 Barb. 647; *Horner v. Marshall*, 5 Munf. 466; *Yeates v. Reed*, 4 Blackf. 463, and whatever may be the full legal definitions of necessity, inevitable danger, and unavoidable accident, the occurrence complained of in this case was one for which the defendant is not liable, unless every one is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence. The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind, or he himself, by a stronger man, had been thrown through

the plaintiff's window. Upon the facts stated, taken in the sense in which we understand them, the defendant is entitled to judgment. 1 Hilliard on Torts, ch. 3, 3d ed. ; *Losee v. Buchanan*, 51 N. Y. 476 ; *Parrot v. Wells*, 15 Wall. 524, 537 ; *Roche v. M. G. L. Co.*, 5 Wis. 55 ; *Eastman v. Co.*, 44 N. H. 143, 156.

Case discharged.

CHAPTER IX.

LIABILITY FOR FIRE OR EXPLOSIVES.

DEAN v. McCARTY.

9 Victoria. 2 Upper Canada Queen's Bench, 448.¹

THIS was an action on the case for negligently keeping fire which the defendant had kindled on his own field in order to clear his land, by reason whereof it spread to the adjoining land of the plaintiff, and destroyed his wood, fences, etc.

Plea, general issue.

It was proved at the trial, which took place at Cobourg, before Mr. Justice McLean, that the defendant was clearing his land, and had set fire to his log-heaps at a favorable time; but, a high wind springing up, the fire unfortunately spread, running through the grass, notwithstanding such efforts as could be used to stop it, and some cord-wood and rails belonging to the plaintiff were destroyed. The plaintiff's witnesses acquitted the defendant of blame, and the case was left to the jury upon the question of fact: whether the defendant had or had not acted with due care and caution in setting the fire as he did, under the circumstances; and whether he did all in his power to prevent injury to his neighbors. The jury found for the defendant.

J. Hillyard Cameron moved, last term, for a rule *nisi* for a new trial, for misdirection; contending that the act of the defendant was of such a nature as made him responsible for the consequences, as it might have been prevented, and that he was bound to protect his neighbor's property from any injurious consequences from the fire which he had kindled for purposes which were beneficial to himself. He cited *Tuberville v. Stamp*, 12 Modern, 152; *Vaughan v. Menlove*, 3 Bing. N. C. 476.

ROBINSON, C. J. . . . It is sought here to hold the defendant liable upon a rigorous and indiscriminating application of what is undoubtedly a legal maxim, *Sic utere tuo ut alienum non lædas*. But this maxim is rather to be applied to those cases in which a man, not under the pressure of any necessity, deliberately, and in view of the consequences, seeks an advantage to himself at the expense of a certain

¹ Part of opinion omitted. — ED.

injury to his neighbor; as, for instance, in the use he makes of a stream of water passing through his land, which he is at liberty to apply to his own purposes, but he must not so use it as to diminish the value of the stream to his neighbor unless he has a prescriptive right. But when we come to apply the maxim to the acts of parties on other occasions, where accident has part in producing the injury, we must see that a great part of the business of life could not be carried on under the risks to which parties would then be exposed. For instance, a man has a right to drive his carriage along the highway, and it may be granted that he must in one sense exercise his right so as not to injure others, — that is, he must not intentionally injure others, nor injure them by his neglect; but if we were to hold that he must at all events take care, at his peril, that he do them no injury, then, if his horses should be frightened by a flash of lightning, and become ungovernable, he must answer, civilly at least, for all the damages they may commit, though it might be to his ruin. So, again, a ship might be riding at anchor with others, well secured, and carefully attended to by a competent crew; and yet, if by the violence of a tempest she should be driven from her anchorage against another ship, and occasion her loss and injury, it could not be held that the owners were liable, on the principle that they must at their peril so use their own ship as not to injure others. In these cases, the taking the horse into the highway and the bringing the ship to an anchor are as much the voluntary acts of the party as the kindling the fire was, in the case before us; but it is indispensable that allowance should be made for the necessity people are under for doing such acts, and that misfortune and neglect should not be confounded.

We cannot go so far as to hold that, in all such cases, whether an act has been imprudent or not must be taken to be proved by the result alone; though we cannot but feel that cases of great hardship may arise, and in which the inclination of a Court might generally be to throw the loss upon the party kindling the fire, even when there might appear no clear ground for ascribing a want of due caution to him. For example, a man may have a very valuable mill, and a neighbor having a small piece of wood adjoining to it, of trifling value compared to the mill, in the process of clearing sets fire, which, unfortunately, by a sudden rise or change of wind, spreads so as to consume the mill, in spite of all the exertion that can be used. It may be said, here is a case in which one of two innocent men must bear a serious loss, and that the misfortune would more properly fall upon the one who was a voluntary agent in setting the cause of the injury in motion, than upon him who had no share whatever in producing it. And we might perhaps be right in believing that it would have been possible for the party clearing the land to have done it at such a time, and in such a manner, as would certainly have prevented the accident occurring. Still, I apprehend that such a case must go to the jury, like all other cases of the kind, upon the question of negligence. If

the principle is a sound one, it must be applied throughout; though indeed it might seem reasonable, where very valuable property might be endangered, to apply an extraordinary degree of caution and diligence; but that consideration would only affect the determination of the jury upon the fact of what was reasonable care under the circumstances. We must consider, on the other hand, in examining the soundness of what we assume to be the principle, what would be the state of things if the person kindling the fire were to be inevitably and in all cases liable for the consequences. It is not very long since this country was altogether a wilderness, as by far the greater part still is. Till the land is cleared, it can produce nothing, and the burning of the wood upon the ground is a necessary part of the operation of clearing. To hold that what is so indispensable, not merely to individual interests, but to the public good, must be done wholly at the risk of the party doing it, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which, in other business of mankind, is plainly settled and always upheld. If it could be shown that this business of clearing land could, by means which we can suppose to be within the reach of those employed in it, be done at a time, or in a manner, that would make it wholly independent of any accident beyond the control of the party, then perhaps the bare fact of not having taken those certain means might be held to constitute negligence; in which case, the liability for damages would always, as a matter of course, follow the injury. But as we cannot, I think, venture to hold that there are any certain means of avoiding such accidents, it must, in such case, be a question of fact for the jury whether the defendant has any negligence to answer for or not. In Comyns's Digest, Tit. *Action upon the Case for Negligence*, A, 6, the law is thus laid down: "So, an action upon the case lies upon the general custom of the nation (in other words, by the common law), against the master of a house, if a fire be kindled there and consume the house or goods of another." "So, if a fire be kindled in a yard or close to burn stubble, and by negligence it burns corn, etc., in an adjoining close." As to the first part of what is here said, applying to accidental fires in houses, we know that the law has, by act of Parliament, been placed on a different footing, 6 Anne, c. 31; 14 Geo. III., c. 78, §§ 85, 86, and that it has been thought reasonable to exempt persons from answering in damages for injuries occasioned to others in such cases, even where there has been a want of due care.¹ But as to the latter part of the doctrine laid down, but which applies to the case of a fire spreading which has been kindled in a field to burn stubble, I do not feel that the law is anywhere denied to be such as Chief Baron Comyns assumes it to be. It has not, in this respect, been altered by statute, nor does it seem to have been, in more modern authorities, laid down

¹ But see *Filliter v. Phippard*, 11 Q. B. 347. — Ed.

differently ; neither has it been made a question whether this principle, thus laid down, had been carefully considered and correctly stated. We see, then, that it is when by negligence the fire spreads to an adjoining close that an action lies. And the same very learned author adds : " So, it lies not if it appears that a fire lighted for the burning of stubble, etc., by a sudden wind, or other inevitable accident, without the fault of the defendant, or his servants, burns the corn of another." Though there are many other cases which would supply reasoning from analogy in support of the principle thus laid down, yet the single case relied upon by the Chief Baron is that of *Tuberville v. Stamp*, reported by himself, Com. 32, Lord Raymond, Salkeld, Holt, and in several other reports : 1 Salk. 13 ; 2 Salk. 726 ; Comb. 459 ; Skin. 681 ; Carth. 425 ; 12 Modern, 152 ; 1 Ld. Raym. 264. And this case is certainly expressly to the point, and warrants the doctrine laid down ; and, unless it can be shown to have been overruled, it must govern in this case. It is reported in 12 Modern, 152, in a clear and concise manner, and stripped of anything extraneous to the main point which is the question here. On that account only, I refer to the case as it is there given ; for, if the report differed materially in its effect from the account of the case given by the other reporters, we should doubtless feel more safe in relying upon some of them. The action was upon the case for negligently keeping defendant's fire, and the declaration charged that defendant so carelessly kept the fire in his close that it burnt the plaintiff's heath in his field. After verdict for the plaintiff, it was moved, in arrest of judgment, that the action would only lie on the special circumstances of the case for actual negligence, whereas here it was grounded on a supposed general custom of the nation ; and, as I understand the case, the objection intended to be urged was that the plaintiff, by so stating his grievances, relied upon the custom of the nation as supplying the presumption of negligence, in such cases, from the mere occurrence of the accident, and when there might, in fact, have been no negligence ; in short, that it placed the defendant on the same footing, in that respect, as a common carrier. Turton, J., observed : " There is a difference between fire in a man's house and in the field ; in some counties it is a necessary part of husbandry to make fire in the ground, and some unavoidable accident may carry it into a neighbor's ground and do injury there ; and this fire not being so properly in his custody as the fire in his house, I think this is not actionable as it is laid." But by Holt, C. J., and the other judges : " Every man must so use his own as not to injure another. The law is general ; the fire which a man makes in his fields is as much his fire as the fire in his house ; it is made on his grounds with his materials, and by his order, and he must at his peril take care that it does not through his neglect injure his neighbor ; if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbor's ground, and prejudice him, this is fit to be given in evidence. But now here, it is found to have been by his negligence, and it is the same as if it had been in his house." It

was after verdict, and negligence was charged in the declaration; and therefore they held they could not arrest the judgment. This contains all the doctrine under consideration. We cannot distinguish the case from the one before us. The Court did not then hold that the person lighting the fire must take care at all events that it does not injure his neighbor, but that he must take care that it shall not do so "through his neglect." And this doctrine, and the authority of this case, was most fully recognized in the recent case of *Vaughan v. Menlove*, 3 Bing. N. C. 476. What would be neglect, and what not, under the circumstances of each case, may sometimes give rise to nice questions, some of which may be considered not to rest wholly with the jury, — such as the necessity and sufficiency of notice to the parties whose lands adjoin, of the intention to set fire. But, in this case, the objection taken is the broad one that the defendants must be liable at all events, — a doctrine which cannot, in our opinion, be maintained. The verdict is not moved against as being against the weight of evidence; and if it were, we should require a strong case, when the verdict is for the defendant, to grant a second trial in such an action. We ought not, indeed, do it unless we were clearly of opinion that the jury, upon the evidence before them, ought to have found a verdict for the other party.

*Rule refused.*¹

BACHELDER ET AL. v. HEAGAN.

1840. 18 *Maine*, 32.²

THE action was trespass on the case, to recover damages, alleged to have been done to the plaintiffs' land, and to the fences and growth thereon, by the negligence of the defendant in setting a fire on his own land, near to the land of the plaintiffs, and in not carefully keeping the same.

At the trial before Emery, J., evidence was introduced by both parties. The counsel for the plaintiffs requested the judge to instruct the jury, that the plaintiffs were entitled to a verdict, if they were satisfied from the evidence, that the damage was occasioned by the defendant's fire, unless he satisfied them that it was not through negligence or mismanagement on his part. The judge instructed the jury, that the burthen of proof was upon the plaintiffs to satisfy them, beyond a reasonable doubt, that the damage was occasioned by the defendant's fire, and through the carelessness and negligence of the defendant in keeping the same; such carelessness and negligence being alleged in the plaintiffs' declaration, and it not being contended by the plaintiffs that the fire was wilfully and maliciously set by the de-

¹ In some States there are statutes imposing greater liabilities than would exist under the above decision upon persons setting fires in woods or upon land. See 2 *Shearman & Redfield on Negligence*, 4th ed. s. 671. — ED.

² Citations of counsel omitted. — ED.

fendant. On the return of a verdict for the defendant, the plaintiffs filed exceptions to the ruling of the judge.

Kelly, for plaintiffs.

W. G. Crosby, for defendant.

The opinion of the Court was by

WESTON, C. J. By the ancient common law, or custom of the realm, if a house took fire, the owner was held answerable for any injury thereby occasioned to others. This was probably founded upon some presumed negligence or carelessness, not susceptible of proof. The hardship of this rule was corrected by the statute of 6 Ann. c. 31, which exempted the owner from liability, where the fire was occasioned by accident. The rule does not appear to have been applied to the owner of a field, where a fire may have been kindled. It may frequently be necessary to burn stubble or other matter which encumbers the ground. It is a lawful act, unless kindled at an improper time or carelessly managed. Baron Comyns states, that an action of the case lies, at common law, against the owner of a house which takes fire, by which another is injured, and adds, "so if a fire be kindled in a yard or close, to burn stubble, and by negligence it burns corn in an adjoining close." Com. Dig. *Action of the Case for Negligence*, A. 6.

In *Clark v. Foot*, 8 Johns. R. 421, it was held, that if A. sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B., his neighbor, no action lies against A., unless there was some negligence or misconduct in him or his servants. And this is a fair illustration of the common law, upon which the action depends. Negligence or misconduct is the gist of the action. And this must be proved. In certain cases, as in actions against innkeepers and common carriers, it is presumed, by the policy of the law, where property is lost which is confided to their care. But in ordinary cases, of which the one before us is not an exception, where the action depends on negligence, the burthen of proof is upon the plaintiff. This is common learning, and applies to all affirmative averments necessary to maintain an action. The defendant's fire was lawfully kindled on his own land. It is an element appropriated to many valuable and useful purposes; but which may become destructive from causes not subject to human control. Hence the fact, that an injury has been done to others, is not in itself evidence of negligence. The party who avers the fact is bound to satisfy the jury upon this point, before he can be entitled to a verdict. In our opinion, the direction of the presiding judge was correct, as to the burthen of the proof.

*Judgment on the verdict.*¹

¹ In actions against railroad companies, there is a conflict of authority upon the question whether proof that the fire issued from the engine casts upon the company the burden of disproving negligence. In some localities there are statutes expressly imposing this burden upon the company. See *Pierce on Railroads*, 437-438; 2 *Shearman & Redfield on Negligence*, 4th ed. s. 676.

BURROUGHS v. HOUSATONIC RAILROAD COMPANY.

1842. 15 *Connecticut*, 124.¹

THIS was an action on the case. The first count of the declaration, after stating the incorporation of the defendants by the legislature of this State, and their general powers, alleged, That the plaintiffs being lawfully possessed in their own right of a certain building with a cider-mill therein, situated in Bridgeport, on the land of Edward Burroughs, one of the plaintiffs, the defendants, on the 23d of March, 1840, caused a certain steam-engine to pass along their road, near said building and cider-mill, from the pipe or chimney of which engine large sparks of fire were constantly passing into the open air; that the defendants, well knowing the exposed condition of said building and cider-mill to said sparks of fire, did not make use of proper care in passing said building with their engine, but so carelessly and negligently permitted said engine to pass along said road near to said building, that the fire from said pipe or chimney, by means of said negligence and carelessness, fell upon said building and set fire to the same, whereby said building, together with said cider-mill was wholly consumed and destroyed.

There were two or three other counts; but it is not necessary, with reference to any point in the case, to state them.

The cause was tried at Fairfield, February term, 1842, before Sherman, J.

The defendants were duly incorporated by the legislature of this State, by a charter which appears in the Private Laws, p. 1025, and was made part of the case; and their railroad was constructed in conformity with the requirements of such charter. On the day mentioned in the declaration, as a locomotive of the defendants was passing southerly on their railroad, by and near to the plaintiff's building and cider-mill, drawing a train of cars, the sparks from the chimney or smoke-pipe passed directly therefrom upon the roof of said building and set it on fire, and said building and cider-mill were thereby consumed. These were admitted facts.

The plaintiffs claimed to have proved that the fire was owing to the carelessness and unskilfulness of the defendants, in the management of their locomotives. The defendants claimed to have proved that they used their locomotive with all due care and skill, on that occasion; and that the fire occurred without any carelessness on their part.

The plaintiffs contended that even if the jury should find that there was all due care and skill, and no carelessness or negligence on the part of the defendants, they were still entitled to recover damages for

¹ Statement of case abridged. Arguments omitted. — Ed.

the loss of their building, upon the facts admitted, if there was no other objection to their recovery. The Court so charged the jury.¹

The Court directed the jury to inform the Court, on returning their verdict, if they should find for the plaintiffs, whether they did or did not find that the fire was owing to unskilfulness or carelessness on the part of the defendants.

The jury returned a verdict for the plaintiffs; and on inquiry being made as to the fire being caused by the unskilfulness or carelessness of the defendants, they stated, by their foreman, that they could not agree in regard to that fact.

The defendants moved for a new trial for a misdirection.

Booth and Dutton, in support of the motion.

Bissell and Loomis, *contra*.

WILLIAMS, C. J. The question is whether this company, incorporated to construct this road, and to hold lands, engines, cars, and other things necessary for the use of it, are responsible for an injury of this kind; there being no negligence or carelessness on their part. To determine this we must look at the nature of the action. It is founded, says Comyns, C. B., upon a wrong. In all cases where a man has a temporal loss or damage by the injury of another, he may have an action on the case. Com. Dig. tit. *Action on the Case*, A.

This injury may be caused by the unlawful act of another, or from the carelessness or negligent manner in which a lawful act is performed. It is not every act productive of injury to another that lays the foundation of this action; for, says the same eminent judge, it does not lie for a reasonable use of my right, though it may be to the annoyance of another. Com. Dig. tit. *Action upon the Case for a Nuisance*, C.

Have these defendants done any such act, or been guilty of any such negligence, as to subject themselves to this action; or have they used their lawful rights in a reasonable manner? What acts have they done? They have built their road, and put on their engines and cars, for the purpose of transporting passengers by means of steam-power, in the manner of other railroad companies. It is not denied that all they have done is in exact conformity with the object of the act of incorporation. All they have done, then, must be lawful, if the legislature could make it so. Where, then, is the wrong? It is true that a spark from their chimney struck the roof of the plaintiff's building and consumed it; but these defendants neither guided nor directed it. In what respect does it differ from a similar injury by a spark from a dwelling-house? In either case, the spark proceeds from a reasonable use of one's own property; it is guided in the same manner, takes the same direction, and produces the same injury. In the one case, we say it is the effect of accident or the hand of Providence: why not

¹ This decision was made solely on the authority of *Hooker v. The New Haven & Northampton Company*, 14 Conn. Rep. 146, and was, at the time, regarded by some of the profession as a *reductio ad absurdum* from that case.

in the other? If there be no fault in the one case, how can there be in the other? If it be said the sparks would not have been there if the defendants had not come there with their engine, it may also be said they would not have proceeded from the house, if it had not been placed there, or if there had been no fire in it. If it was a reasonable use of a house to have a fire for the ordinary domestic purposes, is it less reasonable or necessary to use fire to create steam for the use of the engine? It has not been claimed that this company could in any other way effect the object of their incorporation. It was indeed intimated that the legislature could not authorize the company to do the act they have done. If by this is meant that they could not authorize them to burn this building without making compensation, it will not be denied. But it does not follow that the legislature could not authorize an act without which, in connection with other incidents, this event would not have happened. The General Assembly authorize a company to erect a bridge over a stream; by the force of the winds a vessel or boat is driven upon one of the piers and bilged. Could it be seriously claimed that the legislature could not lawfully cause this bridge to be erected because accidents might occur? And how does this case differ from that? In both cases an event has occurred injurious to a third person, which would not have happened had not the bridge or the railroad existed. Neither of which, however, of themselves produced the effect. That the legislature could not take away the property of a citizen for public use without compensation, is a fundamental principle. But to say that they can pass no act which, in its remote consequences and in connection with other causes, may affect private property, is a refinement which has never been recognized. If this improvement was for a public object merely, and the defendants stood in the same light as commissioners acting *bona fide* in the execution of a public trust, then they could not be responsible, according to the cases of *Sutton v. Clarke*, 6 Taun. 29, and *Boulton v. Crowther*, 2 B. & Cres. 703. But as the defendants are to derive a personal benefit from these improvements, we do not place the case on that ground.

It was claimed in argument that there was a difference between original and derivative rights. Although this may be an ingenious distinction, it is supported by no authority; and we think it is not founded on principle. What is an original right to property? All rights to property (unless those of the sturdy occupant are an exception) are founded upon, and regulated by, the laws of the land. They are different in different countries; and, at different times, varying in the same country. They are all derivative, — depending upon political establishments; not natural, but civil rights. 2 Bl. Com. 11. What principle then exists, by which a right, acquired by a special legislative grant, can be distinguished from a right acquired under the general law of the land, we have not been able to discover. We must then come to the result, that the acts of the defendants were lawful acts.

But lawful acts may be performed in such a manner, so carelessly,

negligently, and with so little regard to the rights of others, that he who, in performing them injures another, must be responsible for that damage. Thus, the man who turns the water from his own premises, in such a manner as to flow upon and injure his neighbor's lands, ought to respond. So where, by the custom of the realm, the owner of a house, which takes fire and burns another house, is made answerable for the damage, it proceeds upon the ground of negligence. *Tuberville v. Stamp*, 1 Salk. 13. And the action, as appears by the form, was grounded upon this negligence. s. c. 2 Salk. 726. So where one, whose duty it was to keep in repair sea-walls, by his negligence in repairing them suffered the water to overflow, he must answer for that neglect, though it would be otherwise if it had happened by the act of God, and so unavoidably. 2 Bulst. 280; *Henly v. Lyme*, 5 Bing. 91. So if one pull down his own house in so negligent and improvident a manner as to produce unnecessary injury to his neighbor, he is liable therefor. *Walters et al. v. Peetil*, 1 Moo. & Mal. 362. In such case the party must use ordinary and reasonable care. *Massey v. Goyner et al.*, 4 C. & Pa. 161; *Jones v. Bird et al.*, 5 B. & A. 837. So, too, in the common case of running down ships at sea, or carriages on land, and the injury arises from a want of skill or from negligence in the defendant or his servants. *Lack v. Seward*, 4 C. & Pa. 106; *Handaysyde v. Wilson et al.*, 3 C. & Pa. 528; *Hawkins v. The Duchess and Orange Steamboat Co.*, 2 Wend. 452; *Morley v. Gaisford*, 2 H. Bla. 442. On the other hand, when the party is in the performance of a lawful act, and the damage arises without any blamable conduct on the part of the defendant, he will not be responsible therefor; for where there is no wrong there can be no liability in this action. In a recent case, even of trespass *vi et armis*, this principle is ably enforced by Chief-Justice Williams, in the Supreme Court of Vermont, where the Court held that a man who had injured the person of another, by driving upon him, was not responsible if he could not, with prudence and care, have prevented the injury. *Vincent v. Stinehour*, 7 Vt. 62. In trespass, no man should be excused, say the Court, in *Weaver v. Ward*, Hob. 134, unless it be utterly without his fault.

However it may be in trespass, we think that in this action the rule is, that some fault must be shown in the defendant. In case for obstructing a highway, Lord Ellenborough, C. J., says, "Two things must concur to support this action; an obstruction in the road, by the fault of the defendant; and no want of ordinary care to avoid it, on the part of the plaintiff. *Butterfield v. Forrester*, 11 East, 60. And Judge Buller says, "Every man ought to take reasonable care that he does not injure his neighbor; therefore, wherever a man receives any hurt through the default of another, though the same were not wilful, yet if it be caused by negligence or folly, the law gives him an action to recover damages for the injury so sustained." Bul. N. P. 25.

Where, then, there is neither negligence nor folly in doing a lawful act, the party cannot be chargeable with the consequences. Thus,

where the owner of land set fire upon his fallow grounds, which run into and consumed the plaintiff's woods, the defendant was held not to be liable, there being no negligence in him or his servants. *Clark v. Foot*, 8 Johns. Rep. 421. In a similar case in the State of Maine, it was holden that the plaintiff must, on his part, prove negligence in the defendant. *Bachelder et al. v. Heagan*, 18 Maine, 32. So where one building a house sunk the foundation so as to undermine that of the adjoining proprietor, it was held that he was not responsible for consequential damages if he used due diligence and care to prevent injury to his neighbor. *Panton v. Holland*, 17 Johns. Rep. 92. The same principle, it is supposed, governed the Court in *Thurston v. Hancock et al.*, 12 Mass. Rep. 220. It is true, that a judge entitled to great respect has suggested a doubt as to the last case. *Charles River Bridge v. Warren Bridge et al.*, 11 Pet. 638, per Story, J. Several of the cases cited above from the late English reports seem to confirm the principal point in that case, and no authority has been brought by the plaintiffs to support them in this case, except *Hooker v. The New-Haven & Northampton Co.*, 14 Conn. Rep. 146. And with us that is certainly sufficient (unless we are ready to retrace our steps), if the plaintiffs are right in their construction of it. But upon a careful review of that case, we are not able to discover any principle there laid down which will justify the claim of the plaintiffs.

There the defendants, under their charter, had constructed their canal in such a manner, and placed their waste-weir so, that when the canal was full the water would be discharged upon the plaintiffs' meadows, to their great injury. It was not claimed that the injury arose from an act of Providence, or from some unexpected calamity; nor, that the canal could not have been, by additional waste-weirs, so constructed as to have avoided this result. On the contrary, the injury was the natural and necessary result of the manner in which the canal was constructed. Indeed, the very object of this waste-weir was to protect the canal at the risk of those around them. 14 Conn. Rep. 152. It became, therefore, apparent, and it was not denied that the defendants were liable, unless they were protected by the act of incorporation; and the claim was that, as they were authorized to construct this canal, under the superintendence of commissioners, and as this waste-weir had been approved by these commissioners, the company were not responsible for any injury resulting therefrom, as individuals would be in like circumstances. The Court held that the act did not expressly grant such a protection, and that such an implication could not arise upon a fair construction of the act; that, unless the intention of the legislature was clearly manifested, it was not to be supposed that it was intended to authorize this company to violate the private rights of individuals without making them compensation; and a doubt was suggested whether indeed this could be done. It was decided that the defendants in that case were responsible for an act, voluntarily and deliberately done, which, in its immediate consequences,

injured another, in the same manner as an individual would be for a similar act. In this case the defendants only ask that the same principle shall be applied to them as to individuals.

The cases then differ in several important particulars. There it was claimed that the canal was not supplied with sufficient waste-weirs, and so was not properly constructed. Here it is admitted that all has been done as the law required. There it was claimed that the injury might have been avoided by a sufficient number of waste-weirs. Here the injury was unavoidable. There the act done was voluntary, and done for self-protection. Here it was involuntary. There no individual could justify a similar act. Here the defendants only ask the same protection that an individual has. We think, therefore, there is a manifest difference in the cases.

There is another fact in this case which perhaps deserves notice. The plaintiffs placed their building in the position it was, after this road was laid out. The jury, it is true, have not found that the injury happened by their negligence; but this very fact shows that very little danger was apprehended from the engine of this company, and strengthens the idea that the injury was casual, unexpected, unavoidable.

Upon the whole, we think that the defendants are entitled to a new trial.

In this opinion the other judges severally concurred, except WARRE, J., who was of opinion that this case was not distinguishable in principle from that of *Hooker v. The New-Haven & Northampton Co.*, 15 Conn. 316, 319.

*New trial to be granted.*¹

HEEG v. LICHT.

1880. 80 *New York*, 579.

APPEAL from judgment of the General Term of the Supreme Court in the Second Judicial Department, affirming a judgment in favor of defendant, entered upon a verdict. (Reported below, 16 Hun, 257.)

This action was brought to recover damages for injuries to plaintiff's buildings, alleged to have been caused by the explosion of a powder-magazine on the premises of defendant; also to restrain the defendant from manufacturing and storing upon his premises fire-works or other explosive substances.

The facts are sufficiently stated in the opinion.

Philip S. Crooke, for appellant.

Benjamin F. Downing, for respondent.

¹ In some jurisdictions there are statutes making railroad companies liable, irrespective of negligence, for damages by fire originating with their engines. See cases collected in Cooley on Torts, 2d ed. 703; 2 Shearman & Redfield on Negligence, 4th ed. s. 677; Cooley's Const. Lim., 6th ed., 713, n. 1 — ED.

MILLER, J. This action is sought to be maintained upon the ground that the manufacturing and storing of fire-works, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with carelessness or negligence. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder which, without any apparent cause, exploded and caused the injury complained of. The judge upon the trial charged the jury that they must find for the defendant, unless they found that the defendant carelessly and negligently kept the gunpowder upon his premises. The judge refused to charge that the powder magazine was dangerous in itself to plaintiff and his property, and was a private nuisance, and the defendant was liable to the plaintiff whether it was carelessly kept or not; and the plaintiff duly excepted to the charge and the refusal to charge.

We think that the charge made was erroneous and not warranted by the facts presented upon the trial. The defendant had erected a building and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous and liable to cause damage to the property of persons residing in the vicinity. The locality [legality?] of works of this description must depend upon the neighborhood in which they are situated. In a city, with buildings immediately contiguous and persons constantly passing, there could be no question that such an erection would be unlawful and unauthorized. An explosion under such circumstances, independent of any municipal regulations, would render the owner amenable for all damages arising therefrom. That the defendant's establishment was outside of the territorial limits of a city does not relieve the owner from responsibility or alter the case, if the dangerous erection was in close contiguity with dwelling-houses or buildings which might be injured or destroyed in case of an explosion. The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. The keeping or manufacturing of gunpowder or of fire-works does not necessarily constitute a nuisance *per se*. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar it should have been left for the jury to determine whether from the dangerous character of the defendant's business, the proximity to other buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance and answerable for the damages arising from the explosion.

A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Com. 216. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use. Wood's Law of Nuis., § 1, and authorities cited. The cases which are regarded as private nuisances are numerous, and the books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor or of his neighbors, even in the pursuit of a lawful trade. *Aldred's Case*, 9 Coke, 58; *Brady v. Weeks*, 3 Barb. 159; *Dubois v. Budlong*, 15 Abb. 445; *Wier's Appeal*, 74 Penn. St. 230.

While a class of the reported cases relates to the prosecution of a legitimate business, which of itself produces inconvenience and injury to others, another class refers to acts done on the premises of the owner which are of themselves dangerous to the property and the persons of others who may reside in the vicinity, or who may by chance be passing along or in the neighborhood of the same. Of the former class are cases of slaughter-houses, fat and offal boiling establishments, hog-styes or tallow manufactories, in or near a city, which are offensive to the senses and render the enjoyment of life and property uncomfortable. *Catlin v. Valentine*, 9 Pal. 575; *Brady v. Weeks*, 3 Barb. 157; *Dubois v. Budlong*, 15 Abb. 445; *Rex v. White*, 1 Burr. 337; 2 Bl. Com. 215; *Farrand v. Marshall*, 21 Barb. 421. It is not necessary in these cases that the noxious trade or business should endanger the health of the neighborhood. So also the use of premises in a manner which causes a noise so continuous and excessive as to produce serious annoyance, or vapors or noxious smells; *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. (Q. B.) 608; *Brill v. Flagler*, 23 Wend. 354; *Pickard v. Collins*, 23 Barb. 444; Wood's Law of Nuis., § 5; or the burning of a brick kiln, from which gases escape which injure the trees of persons in the neighborhood. *Campbell v. Seaman*, 63 N. Y. 568; s. c., 20 Am. Rep. 567. Of the latter class also are those where the owner blasts rocks with gunpowder, and the fragments are liable to be thrown on the premises and injure the adjoining dwelling-houses, or the owner or persons there being, or where persons travelling may be injured by such use. *Hay v. Cohoes Co.*, 3 Barb. 42; s. c., 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Pixley v. Clark*, 35 id. 523.

Most of the cases cited rest upon the maxim *sic utere tuo*, etc., and where the right to the undisturbed possession and enjoyment of property comes in conflict with the rights of others, that it is better, as a matter of public policy, that a single individual should surrender the use of his land for especial purposes injurious to his neighbor or

to others, than that the latter should be deprived of the use of their property altogether, or be subjected to great danger, loss, and injury, which might result if the rights of the former were without any restriction or restraint.

The keeping of gunpowder or other materials in a place, or under circumstances, where it would be liable, in case of explosion, to injure the dwelling-houses or the persons of those residing in close proximity, we think, rests upon the same principle, and is governed by the same general rules. An individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of his neighbor, than he is authorized to engage in any other business which may occasion serious consequences.

The counsel for the defendant relies upon the case of *People v. Sands*, 1 Johns. 78; 3 Am. Dec. 296, to sustain the position that the defendant's business was neither a public nor a private nuisance. That was an indictment for keeping a quantity of gunpowder near dwelling-houses and near a public street; and it was held (Spencer, J., dissenting), that the fact as charged did not amount to a nuisance, and that it should have been alleged to have been negligently and improvidently kept. It will be seen that the case was disposed of upon the form of the indictment, and while it may well be that an allegation of negligence is necessary where an indictment is for a public nuisance, it by no means follows that negligence is essential in a private action to recover damages for an alleged nuisance. In *Myers v. Malcolm*, 6 Hill, 292, it was held that the act of keeping a large quantity of gunpowder insufficiently secured near other buildings, thereby endangering the lives of persons residing in the vicinity, amounted to a public nuisance, and an action would lie for damages where an explosion occurred causing injury. Nelson, C. J., citing *People v. Sands*, *supra*, says: "Upon the principle that nothing will be intended or inferred to support an indictment, the Court said, for aught they could see, the house may have been one built and secured for the purpose of keeping powder in such a way as not to expose the neighborhood;" and he cites several authorities which uphold the doctrine that where gunpowder is kept in such a place as is dangerous to the inhabitants or passengers, it will be regarded as a nuisance. The case of *People v. Sands* is not therefore controlling upon the question of negligence.

Fillo v. Jones, 2 Abb. Ct. Ap. Dec. 121, is also relied upon, but does not sustain the doctrine contended for; and it is there held that an action for damages caused by the explosion of fire-works may be maintained upon the theory that the defendant was guilty of a wrongful and unlawful act, or of default, in keeping them at the place they were kept, because they were liable to spontaneous combustion and explosion, and thus endangered the lives of persons in their vicinity, and that the injury was occasioned by such spontaneous combustion and explosion.

It is apparent that negligence alone in the keeping of gunpowder

is not controlling, and that the danger arising from the locality where the fire-works or gunpowder are kept, is to be taken into consideration in maintaining an action of this character. We think that the request to charge was too broad, and properly refused. The charge however should have been in conformity with the rule herein laid down, and for the error of the judge in the charge, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

CHAPTER X.

LIABILITY OF OWNER, OR KEEPER, OF ANIMALS.

SECTION I.

Trespass by Animals on Land.

WELLS v. HOWELL.

1822. 19 *Johnson, New York*, 385.

IN error, on *certiorari*, to a Justice's Court. Howell sued Wells before the Justice, and declared against him for that his (Wells') horse had entered the plaintiff's field and destroyed the grass, &c., there, to his damage of ten dollars.

Wells pleaded that there was no fence around the field when the damage was done, and admitted the trespass and the amount of damage. Howell demurred to the plea. It was admitted that there was no fence, as stated, and that there was no town by-law about fences, or cattle running at large. The Justice gave judgment for the plaintiff below, for ten dollars and costs.

PER CURIAM. Every unwarrantable entry on another's land is a trespass, whether the land be enclosed or not. 3 Bl. Com. 209; 3 Selwyn's N. P. 1101. A person is equally answerable for the trespass of his cattle as of himself. 3 Bl. Com. 211. The defendant below was bound to show a right to permit his cattle to go at large; and it is conceded that there was no town regulation on the subject. The judgment must be affirmed.

Judgment affirmed.

BEARDSLEY, C. J., IN TONAWANDA R. R. v. MUNGER.

1848. 5 *Denio, New York*, 267-268.

THE Court seem to have held that if the plaintiff's oxen escaped from his enclosure after the exercise of "ordinary care and prudence in taking care of" them, he was not responsible for their trespass on the defendants' land. This view of the law, we think, cannot be sustained. The plaintiff was bound at his peril to keep his cattle at home, or at all events to keep them out of the defendants' close, and no degree of

“care and prudence,” if the cattle found their way onto the defendants’ land, would excuse the trespass. It would be a new feature in the law of trespass, if the owner of cattle could escape responsibility for their trespasses by showing he had used “ordinary,” or even extraordinary “care and prudence” to keep them from doing mischief.

NOYES v. COLBY.

1855. 30 *New Hampshire* (10 *Foster*), 143.¹

TRESPASS, for breaking and entering the plaintiff’s close in Franklin. Plea, general issue.

The plaintiff proved that towards night, on June 27, the defendant’s cow was upon his premises grazing, between his house and stable. There was no fence between his land and the highway.

The defendant then proposed to prove that, at that time he pastured his cow in a pasture, on the road to Salisbury, and that one Heath also pastured his cow in the same pasture. On the evening in question, when Heath drove home his own cow, he also let the defendant’s cow out of the pasture. He did this without the knowledge or assent of the defendant, and without any authority, and had never done so before, and after this transaction was requested by the defendant not to do so again. He drove the cow down the road until she came to the point where it connects with the road through the village of Franklin, about two hundred feet from the plaintiff’s land, when she strayed along the road and committed the trespass complained of.

The defendant contended that, under such circumstances he could not be held to be a trespasser merely from the fact that he owned the cow; that he had done no wrongful or improper act; that the act of Heath, being without his knowledge or assent, and without his authority, could not make him liable in trespass; that the action should not have been brought against him, but if any trespass had been committed, should have been brought against Heath.

There being no dispute about the facts, the Court ruled that the action could not be maintained; whereupon a verdict was taken for the defendant, upon which judgment was to be rendered, or it was to be set aside, and judgment rendered for the plaintiff for twenty-five cents damages, as this Court might order.

Fowler and Mugridge, for plaintiff.

Pike & Barnard, for defendant.

WOODS, C. J. “A man is answerable for not only his own trespass, but that of his cattle also; for if by his negligent keeping they stray upon the land of another (and much more if he permits or drives

¹ Part of case omitted; also arguments of counsel. — Ed.

them on), and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages." 3 Black. Com. 211. Such is the law as stated in the words of the author of the Commentaries, which are themselves very high authority on such subjects, and such has been the uniform practice and understanding of the law in all times, so far as the books show, and it is therefore too late to inquire whether the remedy by an action of trespass is founded upon the strictest logical propriety, where the cause of the damage is the negligence, and not the wilful act of the owner of the mischievous beasts.

It is hardly necessary to remark, but for the course of the defendant's argument, that the proposition quoted from Blackstone relates to the case in which the beasts "stray upon the land of another," and not to the case in which they are driven upon it by a stranger; for then the stranger is the author of the wrong, and the horse that he rides, or drives, is the mere passive instrument in his hands, and the owner of it, unless he have lent it for the purpose of the wrong, is as wholly guiltless as any other person. For in that case, the beast does not by the owner's negligent keeping stray upon the land of his neighbors.

It is substantially upon this ground that *Tewksbury v. Bucklin*, 7 N. H. Rep. 518, was decided; in which it was held that a party having the custody of the cattle was answerable for the trespass which they committed by straying upon another's inclosure.

The case finds that the cow "strayed along the road," and committed the act complained of. It would not be just to hold the party to the strict meaning of a single word, if it appeared by the context to have been used inaccurately; but it appears distinctly that the animal, although driven by Heath some distance from the pasture in the direction of the *locus in quo*, was not driven upon it so as to be in his hands a mere instrument for committing a trespass. Heath's trespass was upon the chattel of the defendant, but not upon the soil of the plaintiff. He abandoned the cow, and she being no longer in his custody, "strayed," and involved the owner in the consequences ordinarily incident to permitting beasts to stray into the inclosures of others.

When Heath abandoned the cow, she was about twelve rods from the lands of the plaintiff. From that period she was no longer under the control of Heath, but was again in the legal possession of the defendant, and under his general custody and control; and like other owners having the care and custody of their beasts at the time, he is answerable in trespass for her act in straying upon the close in question, and grazing there.

For misdirection of the judge who tried the cause, the verdict must be set aside, and a *New trial granted.*

BROWN v. GILES.

1823. 1 *Carrington & Payne*, 118.

THIS was an action against the defendant for breaking the plaintiff's close with dogs, &c., and trampling down his grass in a certain close, called Bryant's Close, in the parish of A., on divers days. The defendant pleaded the general issue.

The usual notice not to trespass was proved; and a witness proved that, after the notice, he saw the defendant walking down the turnpike road, and his dog jumped into the field called Bryant's Close.

PARK, J., was decidedly of opinion that the dog jumping into the field without the consent of its master not only was not a wilful trespass, but was no trespass at all on which an action could be maintained; he should therefore nonsuit the plaintiff.

*Verdict for the plaintiff. Damages, one farthing.*¹

TILLET v. WARD.

1882. *Law Reports*, 10 *Queen's Bench Division*, 17.²

APPEAL by special case from the decision of the judge of the County Court of Lincolnshire, holden at Stamford.

The action was to recover £1 for the damage done to goods in the plaintiff's shop.

It appeared that on the 15th of May, 1882, an ox of the defendant was being driven from the live-stock market in Broad Street, Stamford, along a public street called Ironmonger Street, to the defendant's premises. Ironmonger Street has a paved carriage road with a foot pavement on either side, and the plaintiff was the occupier of an ironmonger's shop in the street. The ox, after having gone for some distance down the paved carriage road of Ironmonger Street, driven by the defendant's men, went for a short distance upon the foot pavement on the near or left-hand side, and was driven therefrom by one of the

¹ The question was much argued, whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox. And reasons were offered, which we need not now estimate, for a distinction in this respect between oxen and dogs or cats, on account, first, of the difficulty or impossibility of keeping the latter under restraint; secondly, the slightness of the damage which their wandering ordinarily causes; thirdly, the common usage of mankind to allow them a wider liberty; and, lastly, their not being considered in law so absolutely the chattels of the owner as to be the subject of larceny. — WILLES, J., in *Read v. Edwards*, 17 C. B. N. S. 260, 261. Compare *Doyle v. Vance*, 6 Victorian Law Reports (Cases at Law), 87; stated in the next chapter. — ED.

² Arguments omitted. — ED.

drovers in charge on to the carriage road, and after continuing for a farther distance upon such carriage road, turned again on the pavement about twelve yards from the plaintiff's shop, and continued upon the pavement until it came opposite the plaintiff's shop, when it passed through the open doorway into the shop and did damage to goods therein to the amount claimed. The ox was, as soon as possible after such entry and damage, driven by the defendant's men from the shop to the carriage road and to defendant's premises in another street; but they did not succeed in getting it out until about three-quarters of an hour from the time when it entered. No special act of negligence was proved on the part of the persons in charge of the ox, and there was no evidence that it was of a vicious or unruly nature, or that the defendant had any notice that there was anything exceptional in its temper or character, or that it would be unsafe to drive it through the public streets in the ordinary and usual way. It was proved that at the time the ox left the carriage-way the second time, one of the two men of the defendant in charge of the animal was walking by its side, having his hand upon it, and that the other man was walking about three yards in the rear of it. The two men in charge proved that they drove it unaccompanied by other cattle from the market, and they both declared that they did all they could under the circumstances to prevent it going on to the foot pavement and entering the open doorway of the plaintiff's shop, and they stated that the movement of the ox from the carriage-way on to the foot pavement was sudden and could not by any reasonable or available means have been prevented. It was alleged by the defendant's witnesses, and not contradicted, that it was a usual thing for several oxen to be driven from the Stamford market in charge of two men, and sometimes one man. It was admitted that it was not customary to drive oxen with halters, and that they would probably not go quietly if led by halters.

The County Court judge gave a verdict for the amount claimed, giving the defendant leave to appeal.

The question for the opinion of the Court was, whether upon the facts the plaintiff was entitled to the verdict.

Moon (*W. Graham* with him), for defendant.

Sills, for plaintiff.

LORD COLERIDGE, C. J. In this action the County Court judge has found as a fact that there was no negligence on the part of the drivers of the ox, or, at all events, he has not found that there was negligence, and as it lies on the plaintiff to make out his case, the charge of negligence, so far as it has any bearing on the matter, must be taken to have failed.

Now, it is clear as a general rule that the owner of cattle and sheep is bound to keep them from trespassing on his neighbor's land, and if they so trespass an action for damages may be brought against him, irrespective of whether the trespass was or was not the result of his negligence. It is also tolerably clear that where both parties are upon

the highway, where each of them has a right to be, and one of them is injured by the trespass of an animal belonging to the other, he must, in order to maintain his action, show that the trespass was owing to the negligence of the other or of his servant. It is also clear that where a man is injured by a fierce or vicious animal belonging to another, that *prima facie* no action can be brought without proof that the owner of the animal knew of its mischievous tendencies.

In the present case the trespass, if there was any, was committed off the highway upon the plaintiff's close, which immediately adjoined the highway, by an animal belonging to the defendant which was being driven on the highway. No negligence is proved, and it would seem to follow from the law that I have previously stated that the defendant is not responsible. We find it established as an exception upon the general law of trespass, that where cattle trespass upon unfenced land immediately adjoining a highway the owner of the land must bear the loss. This is shown by the judgment of Bramwell, B., in *Goodwyn v. Cheveley*, 28 L. J. (Ex.) 298. That learned judge goes into the question whether a reasonable time had or had not elapsed for the removal of cattle who had trespassed under similar circumstances, and this question would not have arisen if a mere momentary trespass had been by itself actionable. There is also the statement of Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Ex. 265, that persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk. I could not, therefore, if I were disposed, question law laid down by such eminent authorities, but I quite concur in their view, and I see no distinction for this purpose between a field in the country and a street in a market town. The accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town. No cause of action is shown, and the judgment of the County Court judge must be reversed.

STEPHEN, J. I am of the same opinion. As I understand the law, when a man has placed his cattle in a field it is his duty to keep them from trespassing on the land of his neighbors, but while he is driving them upon a highway he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. The case of *Goodwyn v. Cheveley*, *supra*, seems to me to establish a further exception, that the owner of the cattle is not responsible without negligence when the injury is done to property adjoining the highway, — an exception which is absolutely necessary for the conduct of the common affairs of life. We have been invited to limit this exception to the case of high roads adjoining fields in the country, but I am very unwilling to multiply exceptions, and I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town. I think the rule to be gathered from *Goodwyn v. Cheveley*, *supra*, a very reasonable one, for otherwise I cannot see how we could

limit the liability of the owner of the cattle for any sort of injury which could be traced to them. *Judgment for defendant.*

COOLEY ON TORTS, 2D ED., 398-400.

The statutes which, under some circumstances, or for some purposes, require lands to be fenced by their owners, are so various in the several States that it is not easy even to classify them. Some of them provide merely that unless the owner shall cause his lands to be fenced with such a fence as is particularly described, he shall maintain no action for the trespasses of beasts upon them. These statutes are generally limited in their force to exterior fences, and are intended as a part of a system under which cattle are or may be allowed to depasture the highway. In some States, from the earliest days, beasts have been allowed to roam at large in the highways and unenclosed lands, either by general law or on a vote of the township or county to that effect; a futile permission, if owners of lands are not required to fence against them. A more common provision is one requiring the owners of adjoining premises to keep up, respectively, one-half the partition fence between them, this being apportioned for the purpose by agreement, by prescription, or by the order of fence-viewers. A neglect of duty under these statutes would not only preclude the party in fault from maintaining suit for injuries suffered by himself in consequence thereof, but it would seem that if the domestic animals of his neighbor should wander upon his lands, invited by his own neglect, and should there fall into pits, or otherwise receive injury, he would be responsible for this injury, as one occurring proximately from his own default. The statutes which require the construction of partition fences do so for the benefit exclusively of the adjoining proprietors. These proprietors may, at their option, by agreement, dispense with them, and even if they do not agree to do so, but fail to maintain them as the law contemplates, still, if the cattle of the third persons come wrongfully upon one man's lands, and from there enter the adjoining enclosure, it is no answer to an action of trespass brought by the owner of the latter that the partition fence provided for by the law was not maintained.

WAGNER v. BISSELL.

1856. 3 Iowa, 396.¹

APPEAL from the Jones District Court.

This was an action of replevin for certain cattle. Defendant answered, denying the plaintiff's right to the possession, and also

¹ Arguments, and portions of opinion, omitted. — Ed.

alleging as a special ground of defence, that said cattle (which he admits to be the property of plaintiff) did on the 17th day of August, 1856, trespass upon the unclosed land of defendant, and while so trespassing, and after he had suffered damage to the amount of fifty dollars, he, said defendant, distrained the same, as he had a right to do; and while thus lawfully distrained, and while he thus rightfully had the possession, the said plaintiff replevied the said cattle, without paying, or offering to pay, for the damages sustained. To this answer the plaintiff demurred, which was sustained. Defendant refused to answer over, and judgment being against him, he appeals.

W. J. Henry, for appellant.

Joseph Mann, for appellee.

WRIGHT, C. J. [After deciding a point of pleading.] There is then but one question in the case, and that is, whether the defendant, for the reasons stated in his answer, was entitled to the possession of the property, as against the plaintiff and owner. We are of opinion that he was not, and that the demurrer was therefore properly sustained.

That at common law, every man was bound to keep his cattle within his own close, under the penalty of answering in damage for all injuries arising from their being abroad, is admitted by all. And a part of the same rule is, that the owner of land is not bound to protect his premises from the intrusion of the cattle of a stranger, or third person; and that if such cattle shall intrude or trespass upon his premises, whether inclosed or not, he may, at his election, bring his action to recover the damages sustained, or distrain such trespassing animals, until compensated for such injury. We need not at present stop to ascertain the origin or reason of this rule. It is sufficient to say, that as a principle of the common law, it is well, and we believe universally settled. We are then led to inquire, whether, independent of any statutory provisions, this rule is applicable to our condition and circumstances as a people; and if it is, then whether it has or has not, been changed by legislative action.

Unlike many of the States, we have no statute declaring in express terms the common law to be in force in this State. That it is, however, has been frequently decided by this Court, and does not, perhaps, admit of controversy. But while this is true, it must be understood that it is adopted only so far as it is *applicable* to us as a people, and may be of a general nature. At this time we need only discuss the question whether the principle contended for is applicable; for there can be no fair ground for claiming that it is not of a general nature.

We have assumed that it is only so much of the common law as is *applicable* that can be said to be in force, or recognized as a rule of action in this State. To say that every principle of that law, however inapplicable to our wants or institutions, is to continue in force, until changed by some legislative rule, we believe has never been claimed, neither indeed could it be, with any degree of reason. What is meant however, by the term "*applicable*," has been thought to admit of some

controversy. As stated by Catron, J., in the dissenting opinion in the case of *Seely v. Peters*, 5 Gilm. 130, "Does it mean applicable to the nature of our political institutions, and to the genius of our republican form of government, and to our Constitution, or to our domestic habits, our wants, and our necessities?" He then maintains that the former only is meant, and that to adopt the latter is a clear usurpation of legislative power by the courts. A majority of the Court held in that case, however, as had been previously decided in *Boyer v. Sweet*, 3 Scam. 121, "that in adopting the common law, it must be applicable to the habits and condition of our society, and in harmony with the genius, spirit, and objects of our institutions." And we can see no just or fair objection to this view of the subject. Indeed, there would seem to be much propriety in saying that the distinction attempted is more speculative than practical or real. For what is applicable to our wants, habits, and necessities as a community or state, must necessarily to some extent be determined from the nature and genius of our government and institutions. Or, in other words, to determine whether a particular principle harmonizes with the spirit of our institutions, we must look to the habits and condition of the society which has created and lived under these institutions. We have adopted a republican form of government, because we believe it to be better suited to our condition, as it is to that of all people, — and thereunder we believe our wants, rights, and necessities, as individuals and as a community, are more likely to be protected and provided for. And the conclusion would seem to fairly follow, that a principle or rule which tends to provide for, and protect our rights and wants, would harmonize with that form of government or those institutions which have grown up under it.

But, however this may be, we do not believe that in determining as a Court, whether a particular rule of the unwritten law is applicable, we are confined alone to its agreement or disagreement with our peculiar form of government. To make the true distinction between the rules which are, and are not, applicable, may be frequently embarrassing and difficult to courts.

Where the common law has been repealed or changed by the constitutions of either the States or national government, or by their legislative enactments, it is, of course, not binding. So also, it is safe to say, that where it has been varied by custom, not founded in reason, or not consonant to the genius and manners of the people, it ceases to have force. Bouvier's Law Dict., title *Law Common*. And in accordance with this position, are the following authorities: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness v. Packard*, 2 Peters, 137. And see other remarks of the learned judge, in delivering the opinion in that case, page 143, which have a bearing upon the principal question involved in this.

In *Goring v. Emery*, 16 Pick. 107, in speaking of what parts of the common law and the statutes of England are to be taken as in force in Massachusetts, Shaw, C. J., says: "That what are to be deemed in force is often a question of difficulty, depending upon the nature of the subject, the difference between the character of our institutions, and our general course of policy, and those of the parent country, and upon fitness and usage." And in *The Commonwealth v. Knowlton*, 2 Mass. 534, it is said that "our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were adjudged inapplicable to their new state and condition."

In Ohio the rule is laid down as follows: "It has been repeatedly decided by the courts of this State that they will adopt the principles of the common law, as the rule of decision, so far only as those principles are adapted to our circumstances, state of society, and form of government." *Lindsley v. Coats*, 1 Ham. 243; see also *Penny v. Little*, 3 Scam. 301.

Is the rule of the common law, relied upon by the appellant in this case, applicable to our situation, condition, and usage, as a people? Is it in accordance with our habits, wants, and necessities? As applied to this State, is it founded in reason and the fitness of things? The legislature has certainly not so regarded it. On the contrary, we hope to be able to show that what legislation we have clearly recognizes the opposite rule. At present, we are considering the question without reference to any legislative interpretation or action.

These same inquiries were substantially discussed in the case of *Seely v. Peters*, above referred to; and as we could not hope to answer them more satisfactorily than is there done, we adopt the language used in that case, the appropriateness of which, as applied to this State, will be fully appreciated when we reflect that in their resources and necessities, Illinois and Iowa are almost twin sisters. Both alike are agricultural States — both alike have large and extensive prairies — and are alike destitute of timber, as compared with the eastern and older States of the Union.

Says Trumbull, J., in delivering that opinion: "However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill-adapted to a new country like ours. If this common-law rule prevails now, it must have prevailed from the time of the earliest settlement of the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, that they brought with them, and adopted as applicable to their condition, a rule of law requiring each one to fence up his cattle? that they designed the millions of fertile acres stretched out before them, to go ungrazed, except as each purchaser from the government was able to inclose his part with a fence? This State is unlike any of the eastern States in their early settlement, because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced; and their luxuriant

growth, sufficient for thousands of cattle, must be suffered to rot and decay where it grows, unless settlers upon their borders are permitted to turn their cattle upon them. Perhaps there is no principle of the common law so inapplicable to the condition of our country and the people as the one which is sought to be enforced now, for the first time, since the settlement of the State. It has been the custom of Illinois, so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large. Settlers have located themselves contiguous to prairies, for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon uninclosed ground is universally conceded. No man has questioned this right, although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages on account of the insufficiency of the fences through which their stock have broken; and never till now has the common-law rule that the owner of cattle is bound to fence them up been suffered to prevail, or to be applicable to our condition. The universal understanding of all classes of community, upon which they have acted by inclosing their crops and letting their cattle run at large, is entitled to no little consideration in determining what the law is; and we should feel inclined to hold, independent of any statutes upon the subject, on account of the inapplicability of the common-law rule to the condition and circumstances of our people, that it does not, and never has, prevailed in Illinois."

The learned judge then proceeds to show that it is not necessary to assume that ground in the case before him, for the reason, as he says, that their entire legislation clearly shows that this rule of the common law never prevailed in that State. In like manner, we now propose to refer to some of our own legislation which, we think, will clearly show that it was never supposed to prevail in this State. [Here WRIGHT, C. J., stated, and commented upon, various statutes.]

This brief reference to these several acts must be sufficient, in our opinion, to satisfy any mind that the legislature never understood that the rule of the common law prevailed in this State. We do not maintain that these provisions expressly change the common-law rule. And did we believe that this principle had, at any time, been well established in this State, we should perhaps hold that it had not been changed by these different statutes. Where, however, it is, to say the least, doubtful whether the rule contended for is in accordance with our situation, condition, and wants as a people, where for a series of years there has been no legislation recognizing the existence of such a rule, and where custom and habit have uniformly negatived its existence, we feel entirely justified in giving force to these acts which, if they do not expressly, certainly do impliedly, change the unwritten law.

*Judgment affirmed.*¹

¹ Compare reasons given for the inapplicability of the old common-law rule to Colorado. BECK, J., in *Morris v. Fraker*, 5 Colorado, 428, 429. — Ed.

VALENTINE, J., IN UNION PACIFIC RAILROAD CO. v. ROLLINS.

1869. 5 *Kansas*, 174-178.

THE Court charged the jury that cattle running at large upon the unenclosed land of another are not trespassers; that the owners of cattle have by law a right to so allow them to run at large for the purpose of subsisting and grazing. These instructions are erroneous. They all tended to mislead the jury. It is probably true that the plaintiffs, by allowing their cattle to run at large, committed no actionable trespass, no actionable wrong. But these instructions went further than that; they tended to convey the idea to the jury that the plaintiffs committed no trespass or wrong of any kind; that the plaintiffs below were simply exercising a right, given to them by law, to pasture their cattle on the lands of others.

The common law of England is in force in this State, by statutory enactment, so far as it is not repugnant to, or inconsistent with, the constitution and statutes of this State and of the United States. [Comp. L. 678.] At common law the owner of the land is the owner of the ground and of everything attached to it for an indefinite extent upwards and downwards. He has the exclusive right to possess and enjoy it, unmolested and undisturbed. He is not obliged to fence against the cattle of other persons. The owner of the cattle is bound to keep them upon his own premises, and if they stray upon the land of his neighbor, whether the land is fenced or not, he is liable for any damage they commit while there. And he cannot in general recover for any injury they may receive while thus unlawfully there, unless the injuries are wilfully or wantonly inflicted.

The plaintiffs, however, claim that the common law in this respect has been abolished by the custom of the country and by statute.

As the common law has been adopted by statute and made the paramount rule by express enactment of the legislature, "any custom or usage to the contrary notwithstanding" [Comp. L. 678], we suppose it would take more than a custom of the country to repeal it.

Neither does this custom amount to a prescription. It lacks nearly all of the essential elements of a prescription. It has not been of sufficient duration. The possession of the plaintiffs has not been long-continued, peaceable, or without lawful interruption. Neither does a prescriptive right belong to the public in general, but it belongs to an individual in particular.

Secondly, Has the common law been repealed by statute? We have searched in vain for any such statute. We have been referred to certain fence laws, stray laws, and laws regulating the running at large of stock [Comp. L. 599, 600, 842, 843, 845, *et seq.*; Laws of 1864, 64; Laws of 1865, 91; Laws of 1866, 248]; but none of these statutes repeals the common law in this respect. There is no statute

that gives, or attempts to give, to any person any rights upon another's land, whether it is fenced or not. A statute of that kind would tend to disturb vested rights, and be unconstitutional and void.

As the plaintiffs claim that the owners of cattle have a right to allow their cattle to run at large for the purpose of grazing and subsisting on other people's lands, we have examined the statutes to see what right the legislature have attempted to confer upon one man to take the grass of another, and find that every legislative act with reference to the subject is for the protection of the owner of the grass. One act [Comp. L. 295, § 53; see also page 567] makes it a criminal offence to burn the grass of another; and another act [Comp. L. 896, 897, §§ 1, 3; see also Gen. Stat. 1095, § 1] makes it a criminal offence to cut it down and carry it away, and gives the owner of the grass treble damages, and it makes no difference whether the land is fenced or not.

There is no statute in this State that requires railroad companies or others to fence their lands.

There is no statute that expressly authorizes cattle to run at large anywhere, and there is no statute, as we think, that either expressly or impliedly authorizes them to run at large upon other people's land, the property of private individuals. It is true that the fence laws, stray laws, and the laws regulating the running at large of stock, already referred to, impliedly authorize cattle to run at large; but it cannot be supposed that the legislature thereby intended to authorize them to run at large on the private property of individuals. The legislature cannot dispose of private property in that way. Private property can be taken by the legislature for public use only, and that after just compensation has been made for the same to the owner thereof. The legislature, by these acts, simply authorized cattle to run at large upon such public lands as they had a right to dispose of in that way.

These statutes referred to, specify what shall be lawful fences, modify the common law in some respect as to the damages that shall be recovered, and the remedies that must be resorted to with respect to trespassing animals, and in some cases prohibit stock from running at large, and in other cases impliedly permit them to do so, and have probably so modified the common law that no action lies for injuries done on real estate by trespassing cattle unless such real estate is enclosed with a lawful fence.

The owner of real estate does not use reasonable and ordinary care and diligence to protect his property from the intrusion of roaming cattle unless he encloses it with a lawful fence. And if he receives any injury through the want of such lawful fence he is in about the same condition as though he received injury in any other way through his own negligence. He is like the man who has not used the proper diligence to collect a promissory note, but has allowed the statute of limitations to run against it and bar its recovery. He is without a

remedy. But because he is without a remedy, because he has forfeited his remedy by his own negligence, he has not thereby lifted up the wrongs and trespasses of others upon his own rights, to be moral virtues, or legal rights to be protected and encouraged by law, as seems to be supposed by the plaintiffs below in this case.

ROSSELL v. COTTOM.

1858. 31 *Pennsylvania State*, 525.¹

ERROR to the Common Pleas of Fayette County.

This was an action of trespass, originally brought before a justice of the peace, by John Cottom against Henry Rossell, to recover damages occasioned by the defendant's cattle breaking into the plaintiff's wheat-field and destroying his wheat.

The case came into the Common Pleas by appeal; and on the trial, it appeared that the cattle, at the time of the injury complained of, were in the possession of one Alexander M. Hill, under a contract for agistment.

The defendant's counsel requested the Court below to charge the jury "that if the cattle of the defendant were in the custody of A. M. Hill, as an agister, at the time the trespass was committed and the damages were done, case would be the proper remedy, and the plaintiff cannot recover in this action."

In answer to which the Court below (Gilmore, P. J.) instructed the jury, "that in a case of agistment the owner has such a constructive possession as would render him liable in trespass."

To this instruction the defendant excepted; and a verdict and judgment having been rendered for the plaintiff for \$31.25, the defendant sued out this writ, and here assigned the same for error.

J. B. & A. Howell, for the plaintiff in error.

J. K. Ewing, for the defendant in error.

The opinion of the Court was delivered by

THOMPSON, J. The law seems to be settled that the owner of a beast prone to commit trespasses is liable for injuries resulting from such propensity, such as breaking into enclosures, and consuming and destroying grain, grass, herbage, &c. 3 Bl. Com. 211; Bac. Abr. title *Trespass*, G. So, where a bull broke into an enclosure and gored a horse that he died: 7 W. & S. 369. So, in case of a dog killing sheep: 7 Barr, 254. So, too, in case of a horse permitted to run in the streets of a city which, in its gambols, kicked and injured a person: 3 Harris, 194; and that the remedy is in trespass. The property in the animal raises the duty on the part of the owner to guard against

¹ Arguments omitted. — Ed.

its mischievous propensities ; and failing in this, it holds him answerable for its injurious acts, without regard to the degree of care bestowed in controlling it. *Sic utere tuo alienum non lædas* applies to all such cases. It is not a question of negligence or want of due care on the part of the owner.

The case presented on this record is as to the liability of the owner of cattle for damages done by them while in the possession of another, under a contract of agistment. The plaintiff below sued before a justice of the peace, and if trespass will lie against the owner in such case, then the justice had jurisdiction ; but if the owner is only liable, if at all, for the negligence of his bailee, the agister, the plaintiff must fail. The Court below held the owner, the defendant below, liable, and the plaintiff had judgment.

No direct authority is to be found in our own books illustrative of the case, and but few in the older books ; but it is said in 1 Esp. N. P. 387, title *Trespass*, that “ he who has the care, custody, or possession of the cattle who do the damage is liable to this action ; ” and adds, “ as, if agisted cattle break into another’s land, the agister is liable to the damages. So, if the hogs of A. were put into the yard of B., and they break into C.’s land, action lies against B., even though A.’s servant watches them, and so the owner had a special possession.” *Dawtry v. Huggins*, Clayton, 33 ; Trials per Pais, 201. In 2 Roll. Abr. 546, it is laid down in one case that if the beasts of A., agisted by B., trespass on the close of C., it is in the election of C. to bring trespass against A. or B. This is cited in Bac. Abr. 498 (Bouv. ed.), and is immediately succeeded by a reference to the case in Clayton, as follows : “ But it is laid down in another case, that an action in such case lies only against the agister of the beast.” *Bateman’s Case*, Clayton, 33. This is an error on the part of the author. *Bateman’s Case* is not reported in Clayton ; it is referred to in the case of *Dawtry v. Huggins*. The principle, however, is correctly stated. But in Saund. on Pl. & Ev., *Bateman’s Case*, Clayton, 33, is cited for authority that either A. or B., the owner or agister, may be sued in trespass. This is also an error, both as to the principle and name of the case. *Dawtry v. Huggins* is the case reported in Clayton, 33, and is as follows : “ It was ruled upon an evidence, if A. hath the custody of the goods of B., as here it was, hogs put into the defendant’s yard ; if these do a trespassse to the land of C., adjoining, A. shall be punished in trespassse, and this though the owner’s servant did wait upon them ; and here it was proved the servant of A. did also wait on them and serve them, therefore they were in his speciall possession ; and the like matter was relied on in the case of *Stephen Bateman of Wakefield*, for agist cattle, if they doe commit trespassse, the owner of the soil where, &c., shall answer for that trespassse.” York Assizes, 1651. This case is accurately cited in 1 Esp. N. P., *supra*. Neither *Dawtry v. Huggins* nor *Bateman’s Case* supports the doctrine that either the owner or agister of cattle may, at the election of the injured party, be

sued for the trespass of agisted cattle. They are authority to the contrary. The case in Roll. Abr. 546 refers to the Year Book, 7 Henry IV., which does not sustain it, being but a question of pleading, — whether a stranger to an award could plead it. There was no judgment in the case.

But, independently of authority, it seems clear that the case is with the plaintiff in error. We have said that the law raises a duty on part of the owner to guard against trespasses of animals prone to commit them. This is undoubted as to the absolute owner; nor does it seem to be doubted as applicable to the qualified owner in possession. But the point of the argument is, that either may be made liable in trespass for the depredations of agisted cattle. This cannot be maintained by any legal logic. The reason of liability in such cases arises out of the legal requirements to take the necessary care and control of them, so as to prevent injury, which implies not only the duty, but the right of control. The law must not be so administered as to destroy the relation altogether. And would not this follow, if I must answer in trespass, if my horse, being hired or loaned, break into the field of another while in the custody of the hirer or borrower; or my agisted cattle commit a trespass while under the control of the agister? While in his custody and in his enclosures how can I control them? I could not enter upon his premises to do so without myself becoming a trespasser; and for omitting to do so the principle contended for would make me a trespasser for injuries done by them. It is not the ownership of the trespassing creature, but the possession and use, that raises the liability; if this were not so there would of necessity be an end to borrowing and hiring. The relation is of the same character with that of agistment, — they are all bailments. The bailee, in all such cases, has the legal custody for the purpose of the bailment, has the power of control and management for its full accomplishment, does not act therein by the command of the owner, but is the qualified or special owner himself. He stands in the place of the owner for the purposes specified, has acquired the temporary ownership for this very purpose. Being thus the temporary owner, it is not denied that the trespasses of the cattle are his trespasses. Upon what principle can they be the trespasses of another, although he be the owner? Not upon the principle of control, for that he has parted with. If it exists at all, it must be on account of the bailee's mismanagement. To redress this, trespass is not the remedy, it must be case. In *Wales v. Ford*, 3 Halst. 267, trespass was brought against the owner of a stud horse for injury done by biting and kicking plaintiff's mare and horse. At the time of the injury the horse was in the possession of a third person, who had him in the vicinity in service. *Per Cur.* "The action is misconceived; if any action can be sustained at all, it must be in form of trespass on the case." So we think here; and that the learned judge of the Common Pleas erred in ruling that the action of trespass was well brought against the owner of the cattle for an

injury committed while in the custody of the agister. If liable at all, he was only so in case, and of this the justice had no jurisdiction. This view of the case renders unnecessary the consideration of the other assignments of error.

Judgment reversed and a venire de novo awarded.

BLAISDELL v. STONE.

1881. 60 *New Hampshire*, 507.¹

TRESPASS *qu. cl.* Facts found by a referee. Either the defendant or his son is liable for damage done by the defendant's sheep straying into the plaintiff's land from their pasture, which was a part of the defendant's farm. The defendant had verbally let his farm and farm stock, including the sheep, to his son for the year in which the damage was done; and the son had possession and control of the farm and stock. The stock was appraised at the beginning of the year, and the son had the right to sell it or exchange it for other stock, returning it at the end of the year, or its proceeds if sold or exchanged; and he was to maintain the fences during the year.

Barnard & Barnard, for the plaintiff.

Pike & Parsons, for the defendant.

DOE, C. J. The referee has not found that the title of the farm stock passed from the defendant to his son. The defendant was the general owner of the sheep. His son, as bailee, had the possession and care of them on the farm of which he was tenant. They did not escape into the plaintiff's land from a highway in which they were rightfully and carefully driven. *Mills v. Stark*, 4 N. H. 512, 514; *Brown v. Collins*, 53 N. H. 442; *Hartford v. Brady*, 114 Mass. 466; *Gardner v. Rowland*, 2 Ired. 247; *Goodwyn v. Cheveley*, 4 H. & N. 631. They were not taken from the bailee's possession and driven into the plaintiff's premises by a trespasser. *Noyes v. Colby*, 30 N. H. 143, 153. For the damage done by them while straying from their pasture, the plaintiff is entitled to compensation.

By the ancient common law of England, agistment did not relieve the owner from liability. This rule may have originated in barbaric ideas not now accepted as a ground of legal obligation. *Holm. Com. Law*, 1-38, 116-119, 156. And the question may be whether the rule, unsupported by its primitive reasons, has no existing foundation in the succession of common customs, common necessities, or common sentiments, in which many common-law principles have an origin and a development that are continuous, authorized, and inevitable.

The plaintiff was not legally entitled to actual or constructive notice of the bailment of the defendant's sheep. And under the present con-

¹ Arguments omitted. — Ed

ditions of New Hampshire agriculture, there may be less hardship in the defendant's liability than in a new rule putting the task of discovering the bailment, before suit, upon all persons entitled to damages in such cases. It may be reasonably necessary that the risk of entrusting the custody of cattle to an irresponsible bailee, should so rest upon their owner as not to deprive injured third persons of the benefit of a common-law action, if the bailee is unable to pay the damages. The ancient rule, that the injured party may, at his election, maintain trespass against the owner or his bailee, is not so clearly devoid of modern reason as to require a decision that it has ceased to exist.

Judgment for the plaintiff.

SECTION II.

Damage by Animals, other than Trespass on Land.

MAY v. BURDETT.

1846. 9 *Queen's Bench* (*Adolphus & Ellis, N. S.*), 101.¹

CASE. The declaration stated that defendant, "before and at the time of the damage and injury hereinafter mentioned to the said Sophia, the wife of the said Stephen May, wrongfully, and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature, and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the monkey to be at large and unconfined; which said monkey, whilst the said defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit, on the 2d of September, 1844, did attack, bite, wound, lacerate, and injure the said Sophia, then and still being the wife of said Stephen May, whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame, and disordered, and so remained and continued for a long time, to wit, from the day and year last aforesaid to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey so attacking, biting, wounding, lacerating, and injuring her as aforesaid, the said Sophia has been greatly injured in her health," &c.

Plea, not guilty. Issue thereon.

On the trial, before Wightman, J., at the sittings in Middlesex, after Hilary term, 1845, a verdict was found for the plaintiff with £50 damages. Cockburn, in the ensuing term, obtained a rule to show cause why judgment should not be arrested.

¹ Arguments omitted. — Ed.

In last Hilary term, January 13, 15, and 26, 1846, before LORD DENMAN, C. J., PATTESON, J., COLERIDGE, J., and WIGHTMAN, J.,

Watson and Couch showed cause.

Cockburn and Pickering, contra.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.

This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby, &c.

It was objected on the part of the defendant that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the Register and ending with *Thomas v. Morgan*, 2 C. M. & R. 496; s. c. 5 Tyr. 1085; and all in the same form, or nearly so. In the Register, 110, 111, two precedents of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of *Mason v. Keeling*, reported in 1 Ld. Ray. and 12 Mod., and much relied upon on the part of the defendant, want of due care was alleged, but the scienter was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without

the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also; but various *dicta* in the books were cited to show that this is an action founded on negligence, and therefore not maintainable unless some negligence or want of care is alleged.

In Comyns' Digest, tit. *Action upon the Case for Negligence* (A 5), it is said that "an action upon the case lies for a neglect in taking care of his cattle, dog, &c;" and passages were cited from the older authorities, and also from some cases at *nisi prius*, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed, without express averment. The precedents as well as the authorities fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith v. Pelah*, 2 Stra. 1264, and a passage in 1 Hale's Pleas of the Crown, 430,¹ put the liability on the true ground. It may be that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence, by plea in confession and avoidance; but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shows a *prima facie* liability in the defendant.

It was said, indeed, further, on the part of the defendant, that, the monkey being an animal *feræ naturæ*, he would not be answerable for injuries committed by it if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to this objection; for, in the first place, there is no statement in the declaration

¹ After stating that "if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality, he is not punishable, &c.," Hale adds (citing authorities) that "these things seem to be agreeable to law."

"1. If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it.

"2. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey that broke its chain and got loose.

"3. And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." 1 Hale's P. C. 430, Part I. c. 33.

that the monkey had escaped, and it is expressly averred that the injury occurred whilst the defendant kept it; we are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule therefore will be discharged.

*Rule discharged.*¹

FILBURN v. PEOPLE'S PALACE AND AQUARIUM
COMPANY, LIMITED.

1890. *Law Reports*, 25 *Queen's Bench Division*, 258.

APPEAL from a judgment of Day, J.

The action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant, which was the property of the defendants, and was being exhibited by them. The learned judge left three questions to the jury: whether the elephant was an animal dangerous to man; whether the defendant knew the elephant to be dangerous; and whether the plaintiff brought the attack on himself. The jury answered all three questions in the negative. The learned judge entered judgment for the plaintiff for a sum agreed upon in case the plaintiff should be entitled to recover.

The defendants appealed.

Lockwood, Q. C., and *Cyril Dodd*, Q. C., in support of the appeal. There are certain animals recognized as being of an untamable nature, and these a person keeps at his peril. In Hale's *Pleas of the Crown* (vol. i. p. 430), it is said: "Tho' he have no particular notice that he did any such thing before, yet if it be a beast, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage." There is, however, no hard and fast line which prevents an animal *feræ naturæ* ceasing to belong to that class and becoming domesticated. The distinction is drawn in *Rex v. Huggins*, 2 *Ld. Raym.* 1574, where it is said: "There is a difference between beasts that are *feræ naturæ*, as lions and tygers, which a man must always keep up at his peril; and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature, such as oxen and horses. In the latter case an action lies, if the owner has had notice of the quality of the beast; in the former case an action lies without such notice." All animals are wild by nature, and the reason for the distinction is, that some of them are treated as domesticated, because they have been tamed and are used in the service of man. Though there are wild elephants, just as there are wild oxen and horses, a great number have

¹ See *Jackson v. Smithson*, 15 *M. & W.* 563. Also, *Card v. Case*, in *C. B.*, Feb. 9, 1848.

been tamed, and are used in the service of man; and the same ruling should apply to individuals of this class as to domesticated animals generally. The jury have negatived any knowledge on the part of the defendants of any dangerous character in this elephant, and they are, under these circumstances, entitled to the verdict.

Montague Lusk, *contra*, was not called on.

LORD ESHER, M.R. The only difficulty I feel in the decision of this case is whether it is possible to enunciate any formula under which this and similar cases may be classified. The law of England recognizes two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognize as not being dangerous on account of their nature. Whether they are *feræ naturæ* so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others that I will not attempt to enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions, — that is, unless it is shown to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation, — it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shown by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was, therefore, immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.

LINDLEY, L. J. I am of the same opinion. The last case of this kind discussed was *May v. Burdett*, 9 Q. B. 101, but there the monkey which did the mischief was said to be accustomed to attack mankind, to the knowledge of the person who kept it. That does not decide this case. We have had no case cited to us, nor any evidence, to show

that elephants in this country are not as a class dangerous; nor are they commonly known here to belong to the class of domesticated animals. Therefore a person who keeps one is liable, though he does not know that the particular one that he keeps is mischievous. Applying that principle to this case, it appears that the judgment for the plaintiff was right, and this appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. The broad principle that governs this case is that laid down in *Fletcher v. Rylands*, Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330, that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. The question of liability for damage done by mischievous animals is a branch of that law which has been applied in the same way from the times of Lord Holt¹ and of Hale until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

BUXENDIN v. SHARP.

Pasch. 8 Will. III., C. B. 2 Salkeld, 662.

THE plaintiff declared that the defendant kept a bull that used to run at men, but did not say, *sciens* or *scienter*, &c. This was held naught after a verdict; for the action lies not unless the master knows of this quality, and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration.²

¹ See *Mason v. Keeling*, 12 Mod. 332.

² *Bayntine v. Sharp*, 1 Lutwych, 90, Nelson's Translation, 33.

"Midd. ss. CASE against the defendant for keeping a mad bull, which wounded the plaintiff.

"He had a verdict, but the judgment was arrested, because it was not alleged that the defendant did know the bull to be mad.

"It doth not appear when this case was adjudged, nor in what Court, neither is there any book cited in it." — Ed.

MASON v. KEELING.

11 William III. 12 Modern, 332.¹

ACTION on the case, in which the plaintiff declared that on the twentieth of June, in the eleventh of the king, the defendant *quendam canem molossum valde ferocem* did keep, and let him go loose unmuzzled *per publica compita*, so that *pro defectu curæ* of the defendant the plaintiff was bit and worried by the said dog, as he was peaceably going about his business in such a street. There was another count, in which it was laid that the defendant knew the dog *ad mordend. assuet.* To the first count there was a demurrer, and to the second not guilty.

And it was strongly insisted that the laying it to be *canem valde ferocem*, and suffered to go about the streets unmuzzled, and *pro defecto curæ*, supplied the want of *sciens*, &c., for it was said to be part of the excellency of the law of England, that it leaves no man without a remedy, that has suffered a wrong through the fault of another. It was agreed there were *damna absque injuriâ*, but that only was when it happens without the commission or omission of any, but never when there is neglect in another, through which I am damnified. And the rule of "*actus non est reus nisi mens sit rea*," holds only in capital offences; and therefore if an infant or a lunatic commit a trespass, they shall answer it in damages, and yet it cannot be said to be *scienter*. Hale's Pl. Cor. 53. "If one keep a beast used to strike, and it kill a man, it is holden by some to be even felony, but by others to be only a great misdemeanor;" and the neglect without knowledge, where damages ensue, subjects the party to action. A soldier at his exercise discharging his gun hurt another, though pleaded to be *involuntariè et per infortunium*, yet action lay, Hob. 134; and the rule in Chief Justice Jones, 205, is, that nothing but an unavoidable necessity shall excuse from repairing an injury to a third person through his default; and here was no necessity for the defendant's keeping *canem valde ferocem*, much less to let him go unmuzzled about the streets; and it is laid in the declaration, and confessed by the demurrer, to be *pro defectu debitæ curæ* of the defendant, and that it was *valde ferox*; and this opportunity is given by the defendant to such creature to do mischief, what then can there be more reasonable than to repair the wrong? There is no default in the plaintiff, for he was going about his lawful occasion; and there is surely a great fault in the defendant to let such a fierce creature range the street of London unmuzzled. Nothing is more probable than that such a dog as this let loose among a crowd of people will do mischief; and it would be needless to give notice of its being likely to do so, and like telling a man that fire would

¹ Compare report of same case in 1 Lord Raymond, 606. — Ed.

burn, or a tiger would do mischief; and this is within the same reason with an action for negligent keeping his fire, for that is *pro def. debit. custod.* of fire, and this *pro def. debit. curæ* of his dog; and the case of fire is a much harder one, for there is none but must trust his servant with fire, and the accidents are many. In 1 Vent. 295, notice is taken of a case which happened before that time, and was this: A butcher let loose an ox, and it was laid, that for want of the due penning of his ox the plaintiff was hurt by it, and there the action lay for want of due penning of his ox; and this is for want of due care of his dog; and here is equal prospect of mischief in both cases. If a man have an unruly horse which breaks through his close or stable and does mischief, an action will lie for it; and it is hard that one should have a remedy for the least trespass done in his land, and none for a trespass done thus to his person by wounding or maiming. Suppose one keeps several mastiffs, shall he be exempt from an action for mischief done by every one of them till he knows that he has done a prior mischief, that is, no care is to be taken to prevent the first mischief? This seems to be contrary to the policy of the law, which delights more in preventing than punishing; and the maxim is, *Præstat cautela quàm medela*. It is objected, that if an action be countenanced upon this declaration, a lap-dog or spaniel shall not snap at a man, but an action shall be straight brought for it, and so it will introduce a multiplicity of actions, which the law abhors. But I answer, that there ought to be "*sciens, &c.*," or that which is tantamount, that it was *ferox*, as here, and then no inconvenience. It is also objected that the precedents are all "*sciens, &c.*" But I answer, that would be an aggravation of damages; and precedents imply only that it would be the surer way so to do, but not that *sciens* is absolutely necessary. It is said that it is necessary in case of an action for biting sheep, and therefore *a pari*. Vide 20 Edw. 4, pl. 11. See 20 Edw. 4, pl. 11, so per Townsend; but there it is not denied, but that if a dog of A. chase the sheep of B. into the soil of C. whereby an action is given to C. against B., that B. shall have an action against A. And there is no comparison between the biting of cattle and biting of a man, for the law has a greater regard to the life and safety of a man than of a beast; and everybody is presumed to know that a dog *valde ferox* will be apt to do mischief, if let loose in a street among a crowd of people. But it is also objected that it may be punished by indictment; and I believe it may; and from thence I infer this action will lie by any that has a special damage, as in 1 Inst. 56 a, and it is a true maxim, "*Quod quisque debet ita uti suo, ut alteri non noceat.*"

RAYMOND, *contra*. Some Books say that the law takes notice of the nature of a mastiff, and that is, that he is tame and domestic, or conversant with man, and therefore an action does not lie for the biting of such a dog without a *sciens*. What is it, then, can distinguish this case from that? It is said that this was a mongrel cur *valde ferox*, and that letting loose in a highway is a public nuisance; and even in that

they fail, for they only say that he let him loose *per compita*, and that does not necessarily signify a street or highway, for Latin authors use it for a court or yard before a man's door; nor do I know of any authority that it is a nuisance to let a dog go at large. And there is a diversity between an ox that ranges the field, far from the society of man, and a dog, which is *animal domesticum*, bred among them, and therefore cannot be presumed to be prone to mischief as the other. And they cannot say that it is the nature of dogs to be fierce; and to say that an averment of its being fierce will support an action is to oppose the whole current of authorities, which all require *sciens*; and it might be fierce and the owner know nothing of it, for they do not aver he did know him to be fierce. And as to the rule of law that no man's wrong should be left remediless, there are few rules without exceptions; and the cases of *Hobart* and *Jones* are not like this, for everybody knows that a gun charged, if it go off, is apt to do mischief, but not so of a dog. And an indictment would not have laid here without a knowledge of the ill quality.

GOULD, J. No doubt but in the case of sheep there ought to be a *sciens*, because that is an accidental quality, and not in the nature of a dog. And as to property of a dog, the Books distinguish; for a man has a property in a dog that is a mastiff or spaniel, for the one is for the guard of his house, the other for his pleasure; but this here is a mongrel, and laid to be *valde ferocem*, and that must be an innate fierceness, and not accidental; and if a dog be *assuet.* to bite cows, and the master know it, that will not be sufficient knowledge to make him liable for his biting sheep. Besides, this case is distinguishable in respect of the place, for the law takes notice of highway, and is a security for passengers; and it would be dangerous to keep such dogs near the highway, where all sorts of people pass at all hours; and to maintain this issue, they must give a natural fierceness in evidence.

HOLT, C. J. If it had been said that the defendant knew the dog to be *ferox*, I should think it enough. The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality; and the law takes notice that a dog is not of a fierce nature, but rather the contrary; and the presumption is against the plaintiff; for can it be imagined a man would keep a fierce dog in his family wittingly? If any beast in which I have a valuable property do damage in another's soil, in treading his grass, trespass will lie for it; but if my dog go into another man's soil, no action will lie. See the case of *Millan v. Hawtree*, 1 Jones, 131, Poph. 161, Latch, 13, 119, that *scienter* is the *gist* of the action; and so is 1 Cro., where it was doubted whether the *scienter* should go to the keeping or quality; nor does it appear here but it was an accidental fierceness, or suppose it were an innate one to this dog

particularly; and it had been given to the owner but an hour before, shall he take notice of all the qualities of his dog at his peril, or shall he have his action against the giver for bestowing him a naughty dog? In case a dog bites pigs, which almost all dogs will do, a *scienter* is necessary. 1 Cro. 255. And I do not doubt but if it be generally laid that a dog was used to bite *animalia*, and the defendant knew of it, it will be enough to charge him for biting of sheep, &c.; and by *animalia* shall not be intended frogs or mice, but such in which the plaintiff has property.

And judgment was given for the defendant by HOLT, Chief-Justice, and TURTON, Justice; GOULD, J., *mutante opinionem suam*.¹

LORD COCKBURN, in FLEEMING v. ORR (SCOTCH COURT OF SESSIONS).

1853. Quoted in note, 2 Macqueen's Scotch Cases in House of Lords, 25.

"I never had any doubt that if my dog worries the sheep of another I am liable.

"It has been urged that the owner's knowledge of the vicious propensities of the dog is requisite to make him civilly responsible, and that he is not liable for damage done by the animal unless such knowledge be proved; but I think that the argument to which I have just now adverted is quite absurd. The vicious tendency of the animal never can be known until some mischief is done; so that the result of the argument would be, that every dog is entitled to have at least one worry, and every bull one thrust, without rendering its master responsible. It may be that such is the law of England, and it rather appears that they have in that country an unbounded toleration for a first offence. But, in the law of Scotland, it is no matter if the animal belonging to the defender, and committing an injury, have four legs or only two. Suppose my coachman, a person in whose skill and care I have from long experience unbounded confidence, drives my carriage over a child, will it be any defence to me that he never did it before?

"There is a well-known principle of the law of Scotland which, I think, is sufficient to carry us through this case. It is, that a party negligently using a dangerous instrument shall be liable for the injury occasioned by his negligence. It is to me quite clear that there was negligence here; and that there is negligence in every case in which a dog of this nature [a foxhound] is so left that he can get at sheep. A man is surely liable for the injurious results of the natural tendency of an animal kept by him, if he does not prevent that tendency from producing those results. Now, it is a natural tendency of such dogs to run after sheep. It is only by education and training that they are brought to run after foxes only. In its untrained state no dog of this kind would waste his energies in running after a fox if it got a good sheep, for the plain reason that a sheep is much more easily caught, and is best worth catching. The tendency to worry sheep is, therefore, a natural tendency in

¹ *Sed quære*; for in s. c. 1 Ld. Ray. 608, it is said the case was adjourned, and that afterwards the parties agreed, and therefore no judgment was given.

such dogs, and for neglecting to guard against it the owner is responsible. On that ground alone I think the defender liable.

“ But a far more important ground of liability than these strictly legal considerations is the common usage and understanding of this country. It is a point which I never heard doubted. There have been plenty of such actions in the Sheriff Courts; but there the discussion has always been on the question of fact, whether the mischief was truly done by the dog of the defender. But I do not think it was ever doubted before, that if the fact was established, the defender was liable for the sheep worried by his dog.”¹

REYNOLDS v. HUSSEY.

1886. 64 *New Hampshire*, 64.

CASE, for injury to the plaintiff caused by the defendant's horse by striking him with the forward feet while standing harnessed into a stage-wagon, and left unattended at the railway station at Alton Corner. The declaration alleged the vicious character of the animal, and knowledge by the defendant.

To show the horse's vicious disposition and its inclination to injure mankind, evidence of numerous instances of its squealing and kicking at people, in the harness, in the stage-wagon, in the barn, and in the stall, — in fact, that it was a notorious kicker, — was admitted, subject to exception by the defendant. The defendant did not deny his knowledge of the vicious character of the horse with respect to kicking, but did deny his knowledge of its rearing and striking with the forward feet.

The defendant requested the Court to charge the jury that he was not liable unless he had at some time previous to the accident known or heard that the horse had struck with the forward feet in a manner substantially similar to that in which the jury found that the plaintiff was struck, which the Court gave with this modification, that if on the evidence they find that the horse had a vicious disposition, and was inclined to injure mankind, so that the defendant, as a reasonable man, knew that it would be disposed to commit acts similar to the one sued for, it would be such knowledge on his part as might make him liable for the injury done the plaintiff; to which the defendant excepted.

T. J. Whipple and *Jewell & Stone*, for the plaintiff.

E. A. Hibbard and *E. H. Shannon*, for the defendant.

BLODGETT, J. The owner of domestic animals not being liable, except by statute, for injuries committed by them, unless he is shown to have knowledge of their tendency to commit such injuries, the evidence

¹ The liabilities of owners of dogs have been greatly increased in some States by statute. Proof of *scienter* is dispensed with; and under some statutes the owner is liable for double damages. See Cooley on Torts, 2d ed. 408, note 4; 2 Shearman & Redfield on Negligence, 4th ed. s. 642; Beven on Negligence, 929. — ED.

excepted to as to the propensity of the defendant's horse to injure mankind, and to his knowledge, was so obviously legitimate, that, unaided by brief or argument, we find no ground for its exclusion.

The exception to the charge stands no better. It is not necessary that the vicious acts of a domestic animal brought to the notice of the owner should be precisely similar to that upon which the action against him is founded. If it were, there would be no actionable redress for the first injury of a particular kind committed by such an animal, because its owner would necessarily be exempt from all liability until it should commit another injury of exactly the same kind. It is enough to say that the law sanctions no such absurdity.

Neither is it necessary, in order to fasten a liability upon the owner, that he have notice of a previous injury to others. *Rider v. White*, 65 N. Y. 54; *Godeau v. Blood*, 52 Vt. 251; *Worth v. Gilling*, L. R. 2 C. P. 1; *Judge v. Cox*, 1 Stark. 285; Cooley, Torts, 344. It is the propensity to commit the mischief that constitutes the danger (*M'Cas-kill v. Elliott*, 5 Strob. 196), and therefore it is sufficient if the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. *Keightlinger v. Egan*, 65 Ill. 235; *Buckley v. Leonard*, 4 Denio, 500; *Applebee v. Percy*, L. R. 9 C. P. 647; Abb. Trial Ev. 645; Shearm. & Red. Neg. (3d ed.) s. 190. The question in each case is, whether the notice was sufficient to put the owner on his guard, and to require him, as an ordinarily prudent man, to anticipate the injury which has actually occurred. Cooley, Torts, 344. Hence it is unnecessary to prove more than that he has good cause for supposing that the animal may so conduct. *Kittredge v. Elliott*, 16 N. H. 82. And a good cause for so supposing in the present case was the defendant's knowledge that the animal was of vicious disposition and "a notorious kicker;" and the jury might well conclude from these undisputed facts alone that the defendant had sufficient knowledge of its vicious nature and propensity to make him liable for its subsequent attack on the plaintiff in consequence of that nature and propensity. For when it is made to appear that any domestic animal is vicious and inclined to do hurt, and the owner has notice, express or implied, of the fact, the law then imposes upon him the duty to keep the animal secure, and makes him liable to any person who, without contributory negligence on his part, is injured by it. And this rule is so entirely reasonable, and is so strictly in accordance with the legal and moral duty obligatory upon everybody so to keep and use his own property as not to wrong and injure others, that authorities need not be cited in its support.

The instruction requested was not correct. As modified by the Court, it was sufficiently favorable to the defendant.

Exceptions overruled.

DECKER v. GAMMON.

1857. 44 *Maine*, 322.¹

THIS is an action on the case² to recover the value of a horse alleged to have been injured by the defendant's horse, and comes forward on exceptions to the rulings of Goodenow, J.

The plaintiff introduced evidence tending to prove that at night, on the 13th of September, 1855, he put his horse into his field well and uninjured. The next morning, September 14, his horse and the defendant's were together in his, the plaintiff's close, the defendant's horse having, during the night, escaped from the defendant's enclosure, or from the highway, into the close of the plaintiff, and that the plaintiff's horse was severely injured by the defendant's horse, by kicking, biting, or striking with his fore feet, or in some other way, so that he died in a few days after.

The defendant requested the presiding judge to instruct the jury that to entitle the plaintiff to recover against the defendant he must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the alleged injury.

The presiding judge declined giving these instructions, and directed the jury that if they should find that the defendant owned the horse alleged to have done the injury to the plaintiff's horse, and if, at the time of the injury, he had escaped into the plaintiff's close, and was wrongfully there, and while there occasioned the injury, and that the horse died in consequence, that the plaintiff would be entitled to recover the value of the horse so injured. That it was not necessary for the plaintiff to prove that the horse was vicious, or accustomed to acts of violence towards other animals or horses, or that the owner had notice of such viciousness or habits.

The jury returned a verdict for the plaintiff.

C. W. Walton and *S. C. Andrews*, for defendant.

T. Ludden, for plaintiff.

DAVIS, J. There are three classes of cases in which the owners of animals are liable for injuries done by them to the persons or the property of others. And in suits of such injuries the allegations and

¹ Arguments omitted. — Ed.

² In the argument for defendant the declaration is set out as follows: —

"In a plea of the case for that the said plaintiff, on the 14th day of September, 1855, was possessed of a valuable horse, of the value of \$125.00, which was peaceably and of right depasturing in his own close, and the defendant was possessed of another horse, vicious and unruly, which was running at large where of right it ought not to be, and being so unlawfully at large, broke into the plaintiff's close, at the time aforesaid, and viciously and wantonly kicked, reared upon, and injured the plaintiff's horse, so that his death was caused thereby, which vicious habits and propensities were well known to the defendant at the time aforesaid. To the damage, &c."

proofs must be varied in each case, as the facts bring it within one or another of these classes.

1. The owner of wild beasts, or beasts that are in their nature vicious, is, under all circumstances, liable for injuries done by them. It is not necessary, in actions for injuries by such beasts, to allege or prove that the owner knew them to be mischievous, for he is conclusively presumed to have such knowledge; or that he was guilty of negligence in permitting them to be at large, for he is bound to keep them in at his peril.

"Though the owner have no particular notice that he did any such thing before, yet if he be a beast that is *feræ naturæ*, if he get loose and do harm to any person, the owner is liable to an action for the damage." 1 Hale P. C., 430.

"If they are such as are naturally mischievous in their kind, in which the owner has no valuable property, he shall answer for hurt done by them, without any notice; but if they are of a tame nature, there must be notice of the ill quality." Holt, C. J. *Mason v. Keeling*, 12 Mod. R. 332.

"The owner of beasts that are *feræ naturæ* must always keep them up, at his peril; and an action lies without notice of the quality of the beasts." *Rex v. Huggins*, 2 Lord Raym. 1583.

2. If domestic animals, such as oxen and horses, injure any one, in person or property, if they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury unless he knew that they were accustomed to do mischief. And in suits for such injuries, such knowledge must be alleged, and proved. For unless the owner knew that the beast was vicious he is not liable. If the owner had such knowledge he is liable.

"The gist of the action is the keeping of the animal after knowledge of its vicious propensities." *May v. Burdett*, 58 Eng. C. L. 101.

"If the owner have knowledge of the quality of his beast, and it doth anybody hurt, he is chargeable in an action for it." 1 Hale P. C. 430.

"An action lies not unless the owner knows of this quality." *Buxendin v. Sharp*, 2 Salk. 662.

"If the owner puts a horse or an ox to grass in his field, and the horse or ox breaks the hedge and runs into the highway, and gores or kicks some passenger, an action will not lie against the owner unless he had notice that they had done such a thing before." *Mason v. Keeling*, 12 Modern R. 332.

"If damage be done by any domestic animal, kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief." *Vrooman v. Sawyer*, 13 Johns. R. 339.

3. The owner of domestic animals, if they are wrongfully in the place where they do any mischief, is liable for it, though he had no notice that they had been accustomed to do so before. In cases of

this kind the ground of the action is that the animals were wrongfully in the place where the injury was done. And it is not necessary to allege or prove any knowledge on the part of the owner that they had previously been vicious.

“If a bull break into an enclosure of a neighbor, and there gore a horse so that he die, his owner is liable in an action of trespass *quare clausum fregit*, in which the value of the horse would be the just measure of damages.” *Dolph v. Ferris*, 7 Watts & Serg. R. 367.

“If the owner of a horse suffers it to go at large in the streets of a populous city he is answerable in an action on the case for a personal injury done by it to an individual without proof that he knew that the horse was vicious. The owner had no right to turn the horse loose in the streets.” *Goodman v. Gay*, 3 Harris R. 188. In this case the writ contained the allegation of knowledge on the part of the defendant; but the court held that it was not material and need not be proved.

The case before us is clearly within this class of cases last described. It is alleged in the writ that “the plaintiff had a valuable horse which was peaceably and of right depasturing in his own close, and the defendant was possessed of another horse, vicious and unruly, which was running at large where of right he ought not to be; and being so unlawfully at large, broke into the plaintiff’s close, and injured the plaintiff’s horse, &c.” It is also alleged that “the vicious habits of the horse were well known to the defendant;” but this allegation was not necessary, and may well be treated as surplusage. If the defendant had had a right to turn his horse upon the plaintiff’s close it would have been otherwise. But if the horse was wrongfully there the defendant was liable for any injury done by him, though he had no knowledge that the horse was vicious. The gravamen of the charge was that the horse was wrongfully upon the plaintiff’s close; and this was what was put in issue by the plea of not guilty.

Nor are these principles in conflict with the decision in the case of *Van Leuven v. Lyke*, 1 Comstock, 515. In that case the action was not sustained because the declaration was not for trespass *quare clausum* with the other injuries alleged by way of aggravation. But in that case there was no allegation that the animal was wrongfully upon the plaintiff’s close; or that the injury was committed upon the plaintiff’s close. 4 Denio R. 127. And in the Court of Appeals it was expressly held that “if the plaintiff had stated in his declaration that the swine broke and entered his close, and there committed the injury complained of, and sustained his declaration by evidence, he would have been entitled to recover all the damages thus sustained.” 1 Coms. 515, 518.

In the case before us, though the declaration is not technically for trespass *quare clausum*, it is distinctly alleged that the defendant’s horse, “being so unlawfully at large, broke and entered the plaintiff’s close, and injured the plaintiff’s horse,” which was there peaceably and

of right depasturing. This was sufficient; and the instruction given to the jury, "that if the defendant's horse, at the time of the injury, had escaped into the close, and was wrongfully there, and while there occasioned the injury, then the plaintiff would be entitled to recover," was correct. And this being so, the instruction requested "that the plaintiff must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the injury," was properly refused.

CUTTING, J., did not concur.

Exceptions overruled.

DOYLE, APPELLANT v. VANCE, RESPONDENT.

1880. 6 *Victorian Law Reports, Cases at Law*, 87.

APPEAL from the County Court, Portland.

The plaint stated that the defendant wilfully kept a dog of a fierce and mischievous nature, well knowing the same, and that the dog worried and killed a mare of the plaintiff. Leave was given to amend, if necessary, by adding a complaint for trespass; but such amendment was not made. The judge found for the plaintiff, with £10 damages. The evidence showed that the defendant's dog ran after the mare, barking at her; that the mare ran away and tried to jump over a fence, but fell and broke her neck. Two of the plaintiff's witnesses admitted that the dog was a quiet one; another witness stated that the dog bit the mare about the heels; the mare was upon the plaintiff's own land at the time.

The defendant appealed on the grounds, (1) of the absence, as the plaint stood, of proof of *scienter*; (2) that, if the amendment were allowed, it would be too large, as no sufficient trespass was proved to maintain this action.

Williams (with him *Hood*) for the appellant. This action cannot be maintained. Trespass is the only possible form of action for such an injury; but if the amendment suggested had been made, to transform the plaint into such an action, the evidence would not sustain it; there is no evidence whatever of *scienter*. Dogs are not among the kinds of animal which the owner is bound to keep within his own premises. Where a dog accompanying his owner jumped into a field, without the permission of the latter, it was held that there was no trespass: *Brown v. Giles*, 1 C. & P. 118. [STAWELL, C. J. That case, and others like it, turn only on the form of action; there cannot be a trespass without some wilful act. Why would not an action for negligence lie? Is there not some evidence of negligence, in the fact that the dog is allowed to run about?] In the case of sheep, the legislature has thought it necessary to give redress; and, "The Dog Act, 1864," (No. 229), sec. 15, dispenses with proof of *scienter* in such case. In

Read v. Edwards, 17 C. B. (N. S.) 245; 34 L. J. (C. P.) 31, there was proof of *scienter*; *Lee v. Riley*, 18 C. B. (N. S.) 722; 34 L. J. (C. P.) 212, was the case of a horse. The plaintiff, doubtless, relies on *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10; 44 L. J. (C. P.) 24; but the animal concerned in that case was a horse. In the present case, there is no evidence, either of *scienter* or of negligence. The owner of a dog is not liable for injury done by him, unless there has been some sort of concurrence, or trespass, on the owner's part, or knowledge of the dog's mischievous nature: *Mason v. Keeling*, 1 Ld. Raym. 606; *Cox v. Burbidge*, 13 C. B. (N. S.) 430; 32 L. J. (C. P.) 89; *Beckwith v. Shordike*, 4 Burr. 2093; *Mitten v. Faudrye*, Popham, 161. A dog, being the constant companion of man, is allowed more liberty than other animals. At common law, stealing a dog was not an indictable offence.

Fink, for the respondent. In *Ellis v. Loftus Iron Co.*, there was no evidence of any previous vice or ill-temper in the animal, and Brett, J., said the question was whether there was any evidence of a trespass, upon the plaintiff's land. If there was evidence of negligence, that would be sufficient to constitute a trespass; the mere act of straying upon another's land may be a trespass in an animal, as well as in a man; no animal in particular is designated. At the present day, the dog is no longer a favored animal; there is no reason for any distinction in his favor. [Barry, J. In *Smith v. Root*, 1 Q. B. D. at p. 83, it is said by Blackburn, J., that the doctrine of *scienter* ought not to be extended.] The old cases relied upon by the appellant, must be taken to be overruled by *Ellis v. Loftus Iron Co.* In *Brown v. Giles*, the reason of the decision was that there was no consent by the owner of the animal, not that there is any distinction between an injury by a dog and an injury by any other animal. Negligence need not be proved where there is a trespass: *Leyden v. Coram*, 3 Vic. L. R., L. 94, per Fellows, J.; *Vandenburgh v. Truax*, 4 Denio, (Amcr.) 464; 2 Sm. L. C. (7th ed.) at p. 548 (notes to *Vicars v. Wilcocks*). The appellant's reliance is upon mere *obiter dicta*.

Cur. adv. vult.

STAWELL, C. J. A dog belonging to the defendant got on land belonging to the plaintiff, how, does not appear, and barked at a horse of the plaintiff which was then grazing quietly in an enclosed field; the horse ran away, tried to leap over the fence, fell and broke its neck. The plaint was in the ordinary form, alleging a *scienter* in the defendant. At the trial, an application was made to add a count for trespass by the dog on the plaintiff's land. The application was granted, and though the amendment was not formally written on the plaint, it may now be considered as having been made. A verdict was given for the plaintiff, with £10 damages.

The defendant has appealed, and the question we have to consider is whether, as a matter of law, he is liable for the trespass committed by

his dog. It would have been competent for the judge at the trial to have found that the dog was on the land, by the leave and license of the plaintiff; all the circumstances point to the probability of that being the case. But he has found that the dog was there as a trespasser. There are a number of cases in which judges have expressed *obiter dicta*, as to the non-liability of an owner for injuries done by his dog, and curious and singular reasons — that a dog was the companion of man (and the like) — have been assigned for those *dicta*; reasons which courts have treated as entitled to high respect, and which have not been dissented from. There is, however, a comparatively recent case, *Read v. Edwards, supra*, in which an action was brought against the owner of a dog for having chased and destroyed game, the declaration alleging *scienter* by the defendant. All the *dicta* of the learned judges to which I have referred were cited in the argument, were commented on and received attention. The case was decided on another point, but Mr. Justice Willes, who delivered the judgment of the Court, said: —

“The question was much argued whether the owner of the dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox, and reasons were offered, which we need not now estimate, for a distinction in this respect between oxen, and dogs or cats, on account, first, of the difficulty or impossibility of keeping the latter under restraint; secondly, the slightness of the damage which their wandering ordinarily causes; thirdly, the common usage of mankind to allow them a wider liberty; and lastly, their not being considered in law so absolutely the chattels of the owner as to be the subject of larceny. It is not, however, necessary in the principal case to answer that question.”

The legitimate inference from these observations is that the question, whether the *dicta* I have referred to are law, has not yet been decided, and that the subject is open for consideration. There may be very cogent reasons, socially, for exempting the owner from liability. But there is no reason which a court of law can recognize. Serious injury might be inflicted by a dog revelling in a highly-cultivated *parterre*, and can it with propriety be said that the owner of the garden can obtain no compensation? It has been decided that a dog can be distrained for *damage feasant*: *Bunch v. Kennington*, 1 Q. B. 679. There can be no question, if an ox were substituted for a dog, as having done the mischief complained of in the present case, the owner would be liable. *Cox v. Burbidge, supra*, which was cited, does not apply. There, the defendant's horse, being on the highway, kicked the plaintiff, a child who was playing there. The defendant was held not guilty of actionable negligence; but that was on the ground that the horse had a right to be on the highway, as well as the child, and was therefore not a trespasser.

In *Lee v. Riley, supra*, through defect of fences which it was the defendant's duty to repair, the defendant's mare strayed in the night time from his close into an adjoining field, and so into a field of the

plaintiffs, in which was a horse. From some unexplained cause the animals quarrelled, and the result was that the plaintiff's horse received a kick from the defendant's mare, which broke its leg, and it was necessarily killed. It was held that the defendant was answerable for the mare's trespass, and the damage was not too remote. The decision was based on the fact that the defendant's mare trespassed on the plaintiff's land, and that it was the duty of the owner of an animal to keep it from trespassing. In *Ellis v. The Loftus Iron Co.*, *supra*, the defendant's horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants', it was held that there was a trespass by the act of the defendants' horse, for which the defendants were liable, apart from any question of negligence on their part.

The owner of an animal is therefore responsible for any damage fairly resulting from a trespass by that animal. The damage here has resulted from the trespass, and the verdict will therefore stand.

The argument based upon "The Dog Act 1864" (No. 229), sec. 15, enacting that the owner of a dog shall be liable for injury done to sheep, without proof of *scienter*, should be noticed; it was urged that the necessity for passing such an enactment implied that there was previously no liability. But that argument goes too far. One part of the enactment is declaratory, and the other is new.

BARRY, J. I am of the same opinion. It is remarkable that this question should not have been settled until now, and, apparently from a desire to avoid overruling old cases which had been decided on the most subtle reasons, the judges have abstained from considering the question in a broad aspect. The old reports abound with expressions of peculiar regard for dogs and cats; and Lord Tenterden does not think it beneath his dignity to quote, in his book on shipping, "If mice eat the cargo, and thereby occasion no small injury to the merchant, the master must make good the loss, because he is guilty of a fault; yet if he had cats on board his ship, he shall be excused." One reason given for the exemption of liability, so far as the dog is concerned, is on account of his familiarity with man. But we cannot regard these every day questions in the same subtle way as they were regarded three hundred years ago. The doctrine of trespass is considered on much more reasonable grounds in these days. Where sheep, oxen, or horses, commit a trespass, it has always been held that the owner is liable; and that liability has been extended to poultry, and poultry are as much domesticated as a dog or a cat. In *Brown v. Giles*, 1 C. & P. 118, Mr. Justice Park is reported to have said that he was decidedly of opinion that a dog jumping into a field without the consent of its master, not only was not a trespass, but was no trespass at all on which an action could be maintained. But that remark was merely *obiter*; the case was decided for the plaintiff on another point. The learned judge has found that there was a trespass. The dog was left to roam at its discretion, uncontrolled by its master.

STEPHEN, J. I also concur. It seems to have been considered, in old times, that there was a marked distinction between trespass by a dog, and trespass by an ox. Now, as a general rule, no such distinction is made. I cannot see why there should be any. This case illustrates how far the law ought to be altered, so as to preserve its accordance with change of time and place. Of course, the Court cannot alter the clearly-expressed language of an act of Parliament, though the reason for it may have ceased. And so also as to actual decisions of the Courts. If there is reason to alter the law, the legislature must do it. But on this question, there have been no more than *obiter dicta* based upon reasons which have no longer any existence. At one time, a dog could not be the subject of a theft. The Court is at liberty, within reasonable limits, to meet the changed circumstances of the present day. I can see no sound reason why there should be a difference between the case of trespass by a dog, and one by an ox.

Appeal dismissed.

FALLON v. O'BRIEN.

1880. 12 *Rhode Island*, 518.

DEFENDANT'S petition for a new trial.

DURFEE, C. J. This is trespass to recover damages for an injury received by the plaintiff, who is a child of tender years, while playing in one of the streets of the city of Providence, in consequence of being kicked by the defendant's horse, which was astray in the street. The defendant, in defence, submitted testimony to show that it was not his horse, but another's, that kicked the plaintiff, and also to show that he kept his horse, with his cows, in an inclosure, and that though they escaped from it on the day the plaintiff was injured, and were loose in the streets, in the neighborhood, about the time the plaintiff was injured, he immediately pursued them and drove them back. He also submitted testimony to show that his horse was gentle and never known to kick. He requested the Court to charge the jury, that if they found he had no knowledge that the horse had a propensity to kick, either from viciousness or playfulness, he would not be liable. The Court refused to charge as requested, but charged that to kick was a natural propensity of a horse, and the defendant was bound to prevent his following it. The defendant further requested the Court to charge the jury that if they found he cared for his horse as a careful person would have cared for it, and that without negligence on his part the horse escaped, and straying, did the injury complained of without trespassing on the plaintiff's property, the plaintiff could not recover. The Court refused so to charge, but did charge that the defendant was bound to keep his horse from straying, and that if his horse, while astray, kicked the plaintiff, it being natural for a horse

to kick, the defendant would be liable for the injury. The jury having found a verdict for the plaintiff, the defendant petitions for a new trial for error in the instructions.

The cases which directly touch the questions presented are few and somewhat discordant. In *Goodman v. Gay*, 15 Penn. St. 188, it was decided that the owner of a horse, who voluntarily permits it to go at large in the streets of a populous city, is answerable to an individual who is kicked by it, without proof that he knew it was vicious. The ground of the decision was that all horses are more or less dangerous when turned loose in the frequented streets of a city, and that all men know it, and that therefore for the owner to permit his horse to go at large in such a street was negligence for which the injured person was entitled to recover, without proof that the owner knew the horse was vicious. In *Dickson v. McCoy*, 39 N. Y. 400, the plaintiff, a child of ten years, was passing along the sidewalk of a populous street in front of the defendant's stable, when the defendant's horse came out, loose and unattended, and in passing, kicked the plaintiff in the face. The proof as to the disposition of the horse was that it was young and playful, but not vicious. The Court left it to the jury to find, under the evidence, whether the defendant was or was not guilty of negligence in permitting the horse to be at large. The jury found for the plaintiff, and their verdict was sustained. In *Holden v. Shattuck*, 34 Vt. 336, the defendant's horse, being at large in the highway, excited the plaintiff's horse to run and injure itself, the harness, and the wagon. In this case the highway was a country road. The Court held that the defendant had a right, under the law in Vermont, to have his horse in the highway depasturing the roadside on his own land, and that to entitle the plaintiff to recover, it was not enough that the horse was there with the knowledge of the defendant, but that to subject the defendant to liability it should be made to appear that the circumstances and occasion, or that the character and habits of the animal, were such as to show carelessness on the part of the defendant in reference to the convenience and safety of travellers on the highway. In *Cox v. Burbidge*, 13 C. B. (N. S.) 430, also in 11 W. R. 435, a child, lawfully on the highway, was kicked by the defendant's horse, grazing there. The action was for negligence in keeping the horse. No *scienter* was alleged or proved. On the contrary, it was in proof that the horse was a quiet animal. There was no express evidence that the horse was in the highway through the defendant's neglect. The Court held that the action would not lie without an allegation, supported by proof, that the defendant knew that his horse was liable to kick.

It will be seen from this citation of cases that the law is not very clearly settled. We agree with the Pennsylvania and New York cases, that a horse, even though he is not vicious, is a dangerous animal to be at large in the frequented streets of a city. We think, however, that the learned judge who tried this case with the jury went too far when he instructed the jury that the defendant, if his horse caused

the injury, was absolutely liable for it without regard to whether the horse's presence in the highway was attributable to his negligence or not. In the American cases cited, it seems to be recognized that it is the negligence of the owner of the animal straying in the highway which renders him liable for the injury inflicted by it; and that if he is guilty of no negligence, he is subject to no liability. In the case at bar, the defendant had an undoubted right to keep his horse in the inclosure near the highway. He had as much right to have it there inclosed as he had to drive it in the streets harnessed. But if, while driving it harnessed, it had escaped from his control without negligence on his part, and running away, had injured the plaintiff, it is perfectly well settled that he would not be liable for the injury. We do not see why he should be any the more liable because the horse, instead of escaping from his control, escaped from an inclosure where he was rightfully kept, unless there was some want of diligence in pursuing and recapturing it. We think the jury should have been instructed, that if the defendant was not negligent in either of these respects, the action was not maintainable; though, in view of the law of State, Gen. Stat. R. I. ch. 96, the jury should also have been instructed that the presence of the horse in the street, going loose and unattended, was *prima facie* evidence of negligence, which, unless rebutted, would entitle the plaintiff to recover.

The judge who held the jury trial doubtless ruled as he did in analogy to the rule of the common law in regard to the straying of domestic animals from the land of their owner into the land of another person. In such a case the owner is liable for the injury, whether he has been negligent or not. But in such a case the trespass to the land is the gist of the action, any other injury being regarded as aggravation. The same law does not apply where the injury is merely personal. *Cox v. Burbidge, supra.*

The defendant makes the point that the proper remedy for the injury complained of by the plaintiff is case, not trespass. The case is not formally before us on this point, but it may save unnecessary expense for us to express our opinion in regard to it. We think it is clear, that unless the defendant intentionally permitted his horse to be at large in the street, trespass does not lie; for otherwise the injury, if it resulted from the defendant's negligence, was a consequential result of it, for which case is the proper remedy. 1 Chitty Pleading, * 140. Case was the remedy resorted to in the cases previously cited, except that from New York, where the common-law distinctions have been abolished.

Petition granted.

Ziba O. Slocum, for plaintiff.

Charles E. Gorman, for defendant.

ERLE, C. J., IN COX v. BURBIDGE.

1863. 13 *Common Bench, New Series*, 435-437.

I AM of opinion that this rule must be made absolute, on the ground that there was a total absence of evidence to support the cause of action alleged. The facts I take to be these: The plaintiff, a child of tender age, was lawfully upon the highway, and a horse, the property of the defendant, was straying on the highway. As between the owner of the horse and the owner of the soil of the highway or of the herbage growing thereon, we may assume that the horse was trespassing; and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed, that if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff. I am also of opinion that so much of the argument which has been addressed to us on the part of the plaintiff as assumes the action to be founded upon the negligence of the owner of the horse in allowing it to be upon the road unattended, is not tenable. To entitle the plaintiff to maintain the action, it is necessary to show a breach of some legal duty due from the defendant to the plaintiff; and it is enough to say, that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. The simple fact found is, that the horse was on the highway. He may have been there without any negligence of the owner: he might have been put there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible; but the party injured has no remedy unless the *scienter* can be proved. This is very familiar doctrine; and it seems to me that there is much

stronger reason for applying that rule in respect of the damage done here. The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbor's corn or pasture. For a trespass of that kind, the owner is of course responsible. But, if the horse does something which is quite contrary to his ordinary nature, — something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has ; and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway. I think the ground upon which the plaintiff's counsel rests his case fails. It reduces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse, without more.

CHAPTER XI.

DECEIT.

SECTION I.

Generally — Nature of Representation.

PASLEY v. FREEMAN.

29 *George III.* 3 *Term Reports (Durnford & East)*, 51.

THIS was an action in the nature of a writ of deceit, to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows: “And whereas, also, the said Joseph Freeman afterwards, to wit, on the twenty-first day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage and persuade the said John Pasley and Edward to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, sixteen other bags of cochineal of great value, to wit, of the value of £2,634 16s. 1d. upon trust and credit; and did for that purpose then and there falsely, deceitfully, and fraudulently assert and affirm to the said John Pasley and Edward that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect, and did thereby falsely, fraudulently, and deceitfully cause and procure the said John Pasley and Edward to sell and deliver the said last-mentioned goods, wares, and merchandises upon trust and credit to the said John Christopher; and, in fact, they the said John Pasley and Edward, confiding in, and giving credit to, the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the twenty-eighth day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last-mentioned goods, wares, and merchandises upon trust and credit to the said John Christopher; whereas in truth and fact, at the time of the said Joseph’s making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect; and the said Joseph well knew the same, to wit, at

London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of £2,634 16s. 1d. last mentioned, or any part thereof, for the said last-mentioned goods, wares, and merchandises; but, on the contrary, the said John Christopher then was and still is wholly unable to pay the said sum of money last mentioned, or any part thereof, to the said John and Edward, to wit, at London aforesaid, in the parish and ward aforesaid; and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last-mentioned assertion and affirmation the said John Christopher was not a person safely to be trusted or given credit to in that respect, as aforesaid, and the said Joseph then well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid; by reason of which said last-mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph, the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last-mentioned goods, wares, and merchandises, and the value thereof, to wit, at London aforesaid, in the parish and ward aforesaid, to the damage," &c.

Application was first made for a new trial, which after argument was refused, and then this motion in arrest of judgment. *Wood* argued for the plaintiffs, and *Russell* for the defendant, in the last term; but as the Court went so fully into this subject in giving their opinions, it is unnecessary to give the arguments at the bar.

The Court took time to consider of this matter, and now delivered their opinions *seriatim*.

GOOSE, J. Upon the face of this count in the declaration no privity of contract is stated between the parties. No consideration arises to the defendant; and he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them; but he knowingly asserted a falsehood, by saying that Falch might be safely intrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive, by which the third person was damaged; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted that the action is new in point of precedent; but it is insisted that the law recognizes principles on which it may be supported. The principle upon which it is contended to lie is that, wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert, and shall endeavor to show that, in every

case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported, it must be upon the ground that there exists in this case what the law deems *damnum cum injuria*. If it does, I admit that the action lies; and I admit that upon the verdict found the plaintiffs appear to have been ~~damified~~. But whether there has been *injuria*, a wrong, a tort, for which an action lies, is a matter of law. The tort complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. *Deceit*, pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true, which is misrepresented; and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time for a supposed injury, which has been daily committed for centuries past. For I believe there has been no time when men have not been constantly ~~damified~~ by the fraudulent misrepresentations of others; and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation, of which the public are not hitherto aware. A variety of cases may be put. Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it he discovers the defect, and sells the estate for less than he gave; why may not an action be brought for the loss upon any principle that will support this action? And yet such an action has never been attempted. Or suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and sure-footed, when in fact the horse is neither the one nor the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller, and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, "If he do not pay for the goods, I will;" for then undoubtedly an action would not have lain against the defendant. Other and stronger

cases may be put of actions that must necessarily spring out of any principle upon which this can be supported, and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of contracts; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit. And so far from a person being bound in a case like the present to tell the truth, the books supply me with a variety of cases, in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is where the affirmation is that the thing sold has not a defect which is a visible one; there the imposition, the fraudulent intent, is admitted, but it is no tort. The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion, such as the party deceived may exercise his own judgment upon; as where it is matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Roll. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; *Bayly v. Merrel*. In *Harvey v. Young*, Yelv. 20, J. S., who had a term for years, affirmed to J. D. that the term was worth £150 to be sold, upon which J. D. gave £150, and afterwards could not get more than £100 for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Roll. Abr. 101, are recognized in 1 Sid. 146. How, then, are the cases? None exist in which such an action as the present has been brought; none, in which any principle applicable to the present case has been laid down to prove that it will lie; not even a *dictum*. But from the cases cited some principles may be extracted to show that it cannot be sustained: 1st. That what is fraud, which will support an action, is matter of law. 2d. That in every case of a fraudulent misrepresentation, attended with damage, an action will not lie even between contracting parties. 3d. That if the assertion be a nude assertion, it is that sort of misrepresentation the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that

the plaintiffs might safely give him credit; but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own, to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in *Yelverton* respecting the value of the term. But at any rate, it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this the plaintiffs might have inquired of others who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of *Bayly v. Merrel*. I am, therefore, of opinion that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

BULLER, J. The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And a question is, whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per Croke, J., 3 Bulst. 95. But it is contended that this was a bare, naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud; and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel, who originally made the motion, that no action could be maintained unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare, naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the Courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro. 196, and all other cases which relate to freehold interests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant deserving notice are *Yelv.* 20, *Carth.* 90, *Salk.* 210. The first of these has been fully stated by my brother Grose; but it is to be observed that the book does not affect to give

the reasons on which the Court delivered their judgment; but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the Court went on a distinction between the words "warranty" and "affirmation," the case is not law; for it was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended. But the true ground of that determination was that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice. Judgment, or opinion, in such case implies no knowledge. And here this case differs materially from that in *Yelverton*; my brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect. For it is stated on this record that the defendant knew that the fact was false. The case in *Yelverton* admits that, if there had been fraud, it would have been otherwise. The case of *Crosse v. Gardner*, Carth. 90, was upon an affirmation that oxen which the defendant had in his possession and sold to the plaintiff were his, when in truth they belonged to another person. The objection against the action was that the declaration neither stated that the defendant deceitfully sold them, or that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill intent. *Ex concessis* therefore if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But, notwithstanding these objections, the Court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro. Jac. 474, it was held that affirming them to be his, knowing them to be a stranger's, is the offence and cause of action. The case of *Medina v. Stoughton*, Salk. 210, in the point of decision, is the same as *Crosse v. Gardner*; but there is an *obiter dictum* of Holt, C. J., that where the seller of a personal thing is out of possession, it is otherwise; for there may be room to question the seller's title, and *caveat emptor* in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym. 593, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases, then, are so far from being authorities against the present action, that they show that if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion, then, is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion

between two or more to support an indictment; but if one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of *Risney v. Selby*, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was £30 per annum, when it was only £20 per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated; nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And, by the words of the book, it seems that if the tenant had said the same thing he also would have been liable to an action. If so, that would be an answer to the objection that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the *dictum* or inference which may be collected from that case. If A., by fraud and deceit, cheat B. out of £1,000, it makes no difference to B. whether A. or any other person pockets that £1,000. He has lost his money; and if he can fix fraud upon A., reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B. buys them, when in truth they are the goods of another, yet, if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of the stranger, yet B. shall have an action for this deceit. It is not clear from this case whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person; what is said at the end of the case only proves that “falsely” and “fraudulently” are equivalent to “knowingly.” If the first were the fact in the case, namely, that he had no authority, the case does not apply to this point; but if he had an authority from his friend, whatever the goods were sold for his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For in 1 Roll. Abr. 100, pl. 1, it was held that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name of my land, this shall bind me forever; and therefore I may have a writ of deceit against him who acknowledged it. So if a man acknowledge a recognizance, statute-merchant or staple, there is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to

whom it was so acknowledged. If that had been necessary it would have been so stated; but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Roll. Abr. 95, l. 25, it is said, "If my servant lease my land to another for years, reserving a rent for me, and, to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances, if the land be incumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty." Here, then is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425; but no notice is taken of this point, probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases. The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration that if there were any fraud, the nature of it is not stated. To this the declaration itself is so direct an answer that the case admits of no other. The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here, then, is the fraud and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient to support the action. But, as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so; by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained; for if a man who is asked a question respecting another's responsibility hesitate or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbor, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible

inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is that he shall give no answer, or that, if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of *Coggs v. Barnard*, which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books which, though not much to be relied on, yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall. In *R. v. Gunston*, 1 Str. 589, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the Court refused to grant a *certiorari*, unless a special ground were laid for it. If the assertion in that case had been wholly innocent the Court would not have hesitated a moment. How, indeed, an indictment could be maintained for that I do not well understand; nor have I learnt what became of it. The objection to the indictment is that it was merely a private injury: but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, even though it be under the specious pretence of serving his friend, I say *ausis talibus istis non jura subserviunt*.

ASHHURST, J. The objection in this case, which is to the third count in the declaration, is that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with the other party who had. But I am of opinion that the action lies notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in *Bayly v. Merrel*, 3 Bulstr. 95, is a sound and solid principle, namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining certain knowledge in his own power, namely, by weighing the goods; and therefore it was a foolish credulity, against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, and which the jury have found to be true; but *non constat* that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs; as if there had before this event subsisted a partnership between him and Falch

which had been dissolved ; but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action, as in *Risney v. Selby*, which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him. But it was argued that the action lies not unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position ; but if there were any such to be found, I should not hesitate to say that it could not be law, for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it ; what is it to the plaintiff whether the defendant was or was not to gain by it ? the injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act ; for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said that if this be determined to be law, any man may have an action brought against him for telling a lie, by the crediting of which another happens eventually to be injured. But this consequence by no means follows ; for in order to make it actionable it must be accompanied with the circumstances averred in this count, namely, that the defendant, “intending to deceive and defraud the plaintiffs, did deceitfully encourage and persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act.” Any lie accompanied with those circumstances I should clearly hold to be the subject of an action ; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon ; for the *quo animo* is a great part of the gist of the action. Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance ; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence, as it was two centuries ago ; if it were not, we ought to blot out of our law-books one fourth part of the cases that are to be found in them. The same objection might, in my opinion, have been made with much greater reason in the case of *Coggs v. Barnard* ; for there the defendant, so far from meaning an injury,

meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And indeed the principle of the case does not, in my opinion, seem so clear as that of the case now before us, and yet that case has always been received as law. Indeed, one great reason, perhaps, why this action has never occurred may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested. Therefore I think the rule for arresting the judgment ought to be discharged.

LORD KENYON, C. J. I am not desirous of entering very fully into the discussion of this subject, as the argument comes to me quite exhausted by what has been said by my brothers. But still I will say a few words as to the grounds upon which my opinion is formed. All laws stand on the best and broadest basis which go to enforce moral and social duties. Though, indeed, it is not every moral and social duty the neglect of which is the ground of an action. For there are, which are called in the civil law, duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by the Lord Ch. B. Comyns (Com. Dig. tit. *Action upon the Case for a Deceit*, A. 1), that "an action upon the case for a deceit lies when a man does any deceit to the damage of another." He has not, indeed, cited any authority for his opinion; but his opinion alone is of great authority, since he was considered by his contemporaries as the most able lawyer in Westminster Hall. Let us, however, consider whether that proposition is not supported by the invariable principle in all the cases on this subject. In 3 Bulstr. 95, it was held by Croke, J., that "fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur, there an action lieth." It is true, as has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds. But consider what those grounds were. Dodderidge, J., said: "If we shall give way to this, then every carrier would have an action upon the case; but he shall not have any action for this, because it is merely his own default that he did not weigh it." Undoubtedly, where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence. And in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the Court held that the action was not maintainable. Then, how does the principle of that case apply to the present? There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals; in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them; and

the law of morality ought to induce them to give the information required. In the case of Bulstrode, the carrier might have weighed the goods himself; but in this case the plaintiffs had no means of knowing the state of Falch's credit but by an application to his neighbors. The same observation may be made to the cases cited by the defendant's counsel respecting titles to real property. For a person does not have recourse to common conversation to know the title of an estate which he is about to purchase; but he may inspect the title-deeds; and he does not use common prudence if he rely on any other security. In the case of Bulstrode, the Court seemed to consider that *damnum* and *injuria* are the grounds of this action; and they all admitted that, if they had existed in that case, the action would have lain there; for the rest of the judges did not controvert the opinion of Croke, J., but denied the application of it to that particular case. Then it was contended here that the action cannot be maintained for telling a naked lie; but that proposition is to be taken *sub modo*. 'If, indeed, no injury is occasioned by the lie it is not actionable; but if it be attended with a damage, it then becomes the subject of an action. As calling a woman a whore, if she sustain no damage by it, is not actionable; but if she lose her marriage by it, then she may recover satisfaction in damages. But in this case the two grounds of the action concur; here are both the *damnum et injuria*. The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false assertion which is stated on the record, by which they sustained a considerable damage. Then, can a doubt be entertained for a moment but that this is injurious to the plaintiffs? If this be not an injury, I do not know how to define the word. Then, as to the loss; this is stated in the declaration, and found by the verdict. Several of the words stated in this declaration, and particularly *fraudulenter*, did not occur in several of the cases cited. It is admitted that the defendant's conduct was highly immoral and detrimental to society. And I am of opinion that the action is maintainable on the grounds of deceit in the defendant, and injury and loss to the plaintiffs.

*Rule for arresting the judgment discharged.*¹

¹ By "Lord Tenterden's Act," 9 Geo. IV. ch. 14, s. 6, it is provided, that no action shall be brought to charge any person upon any representation made concerning the character, conduct, credit, ability, trade, or dealings of any other person, to the intent that such other person may obtain credit, money, or goods, unless such representation "be made in writing, signed by the party to be charged therewith." Statutes of a similar nature have been enacted in some of the United States. — Ed.

LONG v. WOODMAN.

1870. 58 *Maine*, 49.¹

ON exceptions to the ruling of Goddard, J., of the Superior Court of the county of Cumberland.

The declaration, omitting the description of the land, was as follows: —

In a plea of the case; for that the said defendant, on the 6th day of March, 1868, with intent, then and there, to cheat and defraud the plaintiff, together with one George W. Reed, induced the plaintiff to convey to them, the defendant and said Reed, certain real estate of the property of the plaintiff, and of the value of fifteen hundred dollars, described in the plaintiff's deed to the defendant and said Reed, as follows: . . . by then and there lending to the plaintiff a certain sum of money, to wit, the sum of two hundred and thirty-six dollars, to be repaid to them, the defendant and said Reed, with interest in two years from said 6th day of March, 1868, and by promising and causing the plaintiff to believe that they, the defendant and Reed, would then and there, as a part of the same transaction, make, execute, and deliver to the plaintiff, a good and sufficient bond or obligation, stipulating that they, the defendant and said Reed, would reconvey to the plaintiff said real estate upon the payment by him, to them, of said sum of two hundred and thirty-six dollars and interest, at or before the expiration of said two years; whereupon the plaintiff made, executed, and delivered to the defendant and said George W. Reed, a good and sufficient warrantee deed of said real estate, describing it as herein before recited; said deed being made "subject to two mortgages, given by said Joseph Reed, and George W. Reed, to William H. Baxter," which mortgages, since said sixth day of March, A. D. 1868, to wit, on the twenty-first day of August, A. D. 1869, have been paid and satisfied by the mortgagers; yet the said defendant intending wickedly and fraudulently to cheat, deceive, and defraud the plaintiff at the time of said conveyance to him and said George W. Reed, after obtaining said deed from the plaintiff, as aforesaid, refused then and there to make, execute, and deliver such bond or obligation, and ever since has refused, though then, immediately thereafter, and frequently since thereto, requested by the plaintiff; and on the first day of May, A. D. 1868, he, the said defendant, and said George W. Reed, conveyed to Nathan M. Woodman, by quitclaim deed, one undivided third part of said real estate, and on the seventeenth day of September, A. D. 1868, said George W. Reed conveyed to defendant all his right, title, and interest in said property, and the said defendant, on said sixth day of March, A. D. 1868, refused and still refuses to reconvey said

¹ Citations of counsel omitted. — Ed.

real estate to the plaintiff, although the plaintiff was ready, and on the fifth day of March, A. D. 1870, offered to pay and tendered to defendant the sum of three hundred and fifty dollars, being said sum of two hundred and thirty-six dollars and interest thereon, and all charges and expenses to which defendant had been put on account of said property, including taxes, and all other sums due from plaintiff to defendant, and thereupon requested the defendant to release and reconvey said premises to him, the plaintiff, which the defendant, with the same intent to cheat and defraud the plaintiff thereof, refused to do.

To this declaration the defendant specially demurred, and the plaintiff joined the demurrer. The presiding judge sustained the demurrer and adjudged the declaration defective; and the plaintiff alleged exceptions.

Davis & Drummond and Bonney & Pullen, for plaintiff.

A. Merrill, for defendant.

APPLETON, C. J. This is an action on the case for deceit. The defendant has filed a special demurrer to the declaration, which has been joined. The only inquiry arising is whether it sets forth any cause of action.

When stripped of all inculpatory phraseology, the declaration alleges the following facts: that on the 6th day of March, 1868, the defendant, and one George W. Reed, induced the plaintiff to convey to them certain real estate, described in the writ, by lending to him (the plaintiff) two hundred and thirty-six dollars, and by promising to give him a bond to reconvey the property in two years, upon the payment of said sum and interest; that after obtaining said deed they (the defendant and said Reed) refused to give said bond; that on the 5th day of March, 1870, the plaintiff tendered to the defendant the sum of three hundred and fifty dollars, being said sum of two hundred and thirty-six dollars and interest thereon, and all other charges and expenses to which defendant had been put, on account of said property, including taxes and all other sums due from the plaintiff to the defendant; and that he demanded a reconveyance of said property, which defendant then and there refused to make.

To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions, in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts or to the condition of things as then existent. It is not every misrepresentation, relating to the subject-matter of the contract, which will render it void or enable the aggrieved party to maintain his action for deceit. It must be as to matters of fact, substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation. *Hazard v. Irwin*, 18 Pick. 95. An assertion respecting them is not an assertion as to any existent fact. The opinion may be erroneous; the judgment may be unsound; the

expected contingency may never happen; the expectation may fail. An action of tort, for deceit in the sale of property, does not lie for false and fraudulent representations concerning profits that may be made from it in the future. *Pedrick v. Porter*, 5 Allen, 324. An action for deceit in the sale of real estate cannot be sustained by proof of fraudulent misrepresentations as to the price paid by the vendor. *Hemmer v. Cooper*, 8 Allen, 334.

So in criminal law, to sustain an indictment for cheating by false pretences, there must be direct and positive assertion as to some existing matter of fact, by which the victim is induced to part with his money or property. A false representation, promissory in its nature, as to pay money or do some other act, has never been held to be the foundation of a criminal charge. *Ranney v. The People*, 22 N. Y. 413. In an indictment for obtaining goods under false pretences, no statement of anything to take place in the future will constitute a pretence within the meaning of the statute. *Glackan v. Com.*, 3 Met. (Ky.) 232. A representation or assurance in relation to a future event is not a statutory false pretence. *State v. Magee*, 11 Ind. 154.

Here the defendant, when or after he obtained his deed, promised "to make, execute, and deliver a good and sufficient bond," to reconvey, upon certain conditions, the land conveyed to him and Reed, which upon request he refused to do. Here is no false representation or concealment of an existent fact. Yet this is the gist of the plaintiff's complaint, that a promise made has not been performed. Had it been performed, the plaintiff had no case.

Here is a promise to do some future act; but whether it be to pay money or give a bond is immaterial. If the promise had been to pay a sum of money instead of giving a bond no action for deceit could have been maintained, though the money was not paid at the stipulated time. This case in no respect differs from a broken promise to pay for goods sold. The goods are delivered upon the expectation that the promise to pay will be performed. The deed was given upon the expectation that the bond would be delivered in accordance with the promise of the grantee.

The declaration sets forth a promise to deliver a certain bond as therein described. It does not state whether it is in writing or not. There is no special plea denying it to be in writing. *Lawrence v. Chase*, 54 Maine, 196. If the promise was in writing, it was for a sufficient consideration, and the plaintiff may maintain an action thereon.

If not in writing it would be void by the statute of frauds. *Lawrence v. Chase*, 54 Maine, 196. But a verbal promise within the statute is no false representation. It is a promise for the violation of which the law fails to provide a remedy in case of its non-performance. In *Fisher v. New York C. P.*, 18 Wend. 608, the facts were somewhat similar to those in the case at bar. The plaintiff below leased certain premises to the defendant, and promised to make repairs thereon,

which he refused to do. Mr. Justice Cowen, in delivering the opinion of the Court, uses the following language: "Fraud cannot be predicated of a promise not performed, for the purpose of avoiding a written instrument, or a bargain of any kind. This case is no more. A contrary doctrine would avoid almost every contract for a breach of which a suit is to be brought. I have only to say that the tenant and defendant below were content to take the plaintiff's word. If that was not legally obligatory, then there has been a mistake of the law; but the defendant could not set that up as fraud." The case of *Com. v. Brennerman*, 1 Rawle, 314, resembles the present. In delivering the opinion of the Court, Rogers, J., says, "There is no doubt that in the breach of promise, Henry Brennerman, in a moral point of view, was guilty of fraud; but it was no more fraudulent than any other breach of trust or promise. There was no false representation or concealment of any existing fact, which constitutes the legal idea of fraud."

Exceptions overruled.

PETERS, J., IN BURRILL v. STEVENS.

1882. 73 *Maine*, 398-400.

THE instructions to the jury upon that point present the question, whether getting property by a purchase upon credit, with an intention of the purchaser never to pay for the same, constitutes such a fraud as will entitle the seller to avoid the sale, although there are no fraudulent misrepresentations or false pretences.

The question has never been fairly before this Court before this time, so as to require a deliberate decision. The plaintiff contends that the question was settled in the negative in the case of *Long v. Woodman*, 58 *Maine*, 49. But that case falls short of meeting the question presented in the present case. The gist of the charge against the purchaser in that case seems to have been that he fraudulently refused to do after the contract what he agreed to do at the time of the contract, the alleged fraud being an intention formed after the contract rather than contemporaneously with it; and that was an action of deceit based upon a broken promise to convey real estate. Of late years, *nisi prius* rulings in our own Courts have frequently been in accordance with the law as delivered to the jury by the presiding judge in the case at bar, and we think the doctrine may safely be accepted and approved, both upon authority and principle.

It is the admitted doctrine of the English cases, and is sustained by most of the courts in the United States. In *Benj. on Sales* (2d Amer. ed), § 440, note e, very numerous cases are cited to the proposition. *Stewart v. Emerson*, 52 N. H. 301, discusses the question at length, and reviews many authorities.

The plaintiff relies upon the objection that it is not an indictable fraud, an argument which seems to have inclined the Pennsylvania Court against admitting the principle into the jurisprudence of that State. *Smith v. Smith*, 21 Pa. St. 367; *Backentoss v. Speicher*, 31 Pa. St. 324. It has been held by some Courts to be an indictable cheat, the false pretence being in the vendee's pretendingly making a purchase, while his only purpose is to cheat the vendor out of his goods. It is more often considered, however, as not a matter for indictment. Bish. Crim. Law, § 419. But the objection taken by the plaintiff has generally been considered as insufficient to override the rule.

But the doctrine governing the case before us should not be misunderstood. To constitute the fraud, there must be a preconceived design never to pay for the goods. A mere intent not to pay for the goods when the debt becomes due, is not enough; that falls short of the idea. A design not to pay according to the contract is not equivalent to an intention never to pay for the goods, and does not amount to an intention to defraud the seller outright, although it may be evidence of such a contemplated fraud.

Nor is it enough to constitute the fraud that the buyer is insolvent, and knows himself to be so, at the time of the purchase, and conceals the fact from the seller, and has not reasonable expectations that he can ever pay the debt. Some Courts have gone so far as to denominate that a fraud which will avoid the sale. And it may have been so held in bankruptcy Courts, in some instances, as between a vendor and the assignee of the vendee. But it would not, generally, be enough to prove the fraud. The inquiry is not whether the vendee had reasonable grounds to believe he could pay the debt at some time and in some way, but whether he intended in point of fact not to pay it.

Nor is it enough that after the purchase the vendee conceives a design and forms a purpose not to pay for the goods, and successfully avoids paying for them. The only intent that renders the sale fraudulent is a positive and predetermined intention, entertained and acted upon at the time of going through the forms of an apparent sale, never to pay for the goods. *Cross v. Peters*, 1 Greenl. 378; *Biggs v. Barry*, 2 Curtis (C. C. R.), 259; *Parker v. Byrnes*, 1 Low. 539; *Rowley v. Bigelow*, 12 Pick. 306.

DEVENS, J., IN DAWE v. MORRIS.

1889. 149 *Massachusetts*, 191, 192-193.

A REPRESENTATION, in order that, if material and false, it may form the ground of an action, where one has been induced to act by reason thereof, should be one of some existing fact. A statement, promising in its character, that one will thereafter sell goods at a particular

price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any future event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon.

The plaintiff further contends that, as where goods have been obtained under the form of a purchase, with the intent not to pay for them, the seller may, on discovery of this, rescind the contract, and repossess himself of the goods as against the purchaser, or any one obtaining the goods from him with notice or without consideration, an action of tort should be maintained on an unfulfilled promise, which at the time of making the promise intended not to perform, by reason of which non-performance the plaintiff has suffered injury in having been induced to enter into a contract which depended for its successful and profitable performance upon the performance by the defendant of his promise. Assuming that the plaintiff's declaration enables him to raise this question, which may be doubted, . . . there is an obvious difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the non-performance of that which it is the duty of the defendant to perform, and where there is no other wrong than such non-performance. To term this a "tort" would be to confound a cause of action in contract with one in tort, and would violate the policy of the statute of frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts.

POLLOCK ON TORTS, 2D ED.; page 252, and note *m*.

It is settled that the vendor of goods can rescind the contract on the ground of fraud if he discovers within due time that the buyer intended not to pay the price. . . . Whether in such case an action of deceit would lie is a merely speculative question, as if rescission is impracticable, and if the fraudulent buyer is worth suing, the obviously better course is to sue on the contract for the price.

EDGINGTON v. FITZMAURICE.

1882. *Law Reports*, 29 *Chancery Division*, 459.¹

ACTION against Fitzmaurice *et als.*, directors of the Army and Navy Provision Market (Limited), and against Hunt, the secretary, and Hanley, the manager, asking for the repayment by them of a sum of £1500 advanced by the plaintiff on debentures of the company, on the

¹ The case has been much abridged, and the greater part of the report omitted.—Ed.

ground that he was induced to advance the money by the fraudulent misrepresentations of the defendants.

Plaintiff, who was a shareholder in the company, received a prospectus issued by order of the directors, inviting subscription for debenture bonds. This prospectus contained the following statement as to the objects for which the issue of debentures was made:—

“1. To enable the society to complete the present alterations and additions to the buildings, and to purchase their own horses and vans, whereby a large saving will be effected in the cost of transport.

“2. To further develop the arrangements at present existing for the direct supply of cheap fish from the coast, which are still in their infancy.”

Plaintiff took debenture bonds to the amount of £1500; and testified that he relied, as one inducement, on the fact that the company wanted the money for the objects stated in the prospectus.

At the hearing before Denman, J., the plaintiff contended and offered evidence tending to show that the real object of the directors in issuing the debentures was to pay off pressing liabilities of the company, and not to complete the buildings or to purchase horses and vans, or to develop the business of the company.

Sir F. Herschell, S. G., *Rigby*, Q. C., and *Willis Bund*, for plaintiff.

Davey, Q. C., *W. W. Karlake*, Q. C., and *J. Kaye*, for Fitzmaurice.

There was no misrepresentation of any fact, and the directors merely stated their intention as to the money, which of course they might alter. There is every difference between the two: *Maddison v. Alderson*, 8 App. Cases, 467. Unless it amounts to a contract, a mere statement that you will do something is of no effect: *Jordan v. Money*, 5 H. L. C. 185; and if it was a contract then it was with the company, and the directors cannot be sued: *Ferguson v. Wilson*, L. R. 2 Chan. 77.

Crossley, Q. C., *J. Cutler*, *S. Hall*, *A. Young*, *S. Brice*, and *F. A. Lewin*, for other defendants.

Sir F. Herschell, in reply. An allegation of intention may be fraudulent: *Ex parte Whittaker*, L. R. 10 Chan. 446.

[Denman, J., delivered an elaborate opinion, substantially sustaining the plaintiff's contention. He gave judgment against the directors.]

From this judgment, Fitzmaurice and the four other directors appealed.

Davey, Q. C., *Crossley*, Q. C., and *A. Young*, for appellants.

Sir F. Herschell, S. G., *Rigby*, Q. C., and *Willis Bund*, for the plaintiff.

COTTON, L. J. [After referring to other matters.] But it is not necessary to give any decision respecting these statements, because, giving credit to the defendants for having made them fairly, there are other statements which follow, which, in my opinion, cannot be justified. I allude to statements respecting the objects for which the loan was

effected : [His Lordship read the passage from the prospectus in which the objects of the issue of the debentures were stated, and proceeded :] It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the defendants liable to the plaintiff. [I agree that it was a statement of intention, but it is nevertheless a statement of fact, and if it could not be fairly said that the objects of the issue of the debentures were those which were stated in the prospectus the defendants were stating a fact which was not true ; and if they knew that it was not true, or made it recklessly, not caring whether it was true or not, they would be liable.] Did the defendants know or believe that the company was in a flourishing condition ? I think they must have thought that it would turn out well, and that the loan could be paid back, for they had shown their confidence in the company by advancing money of their own. But the question is whether they did not make a statement of a fact which was not correct, and which they knew to be not correct, when they stated the objects for which the loan was asked. I do not say that it was necessary to show that they intended that all the money raised should be applied in carrying out those particular objects, but certainly they ought to show that it was to be spent in improving the property and business of the company. What is the fact ? The financial state of the company was openly discussed at the board meetings, at which the defendants were all present, and it is clear that they were in great financial difficulties at the time. Although I should not, as I have said, have held the defendants liable merely for not referring to the second mortgage in the prospectus, yet the existence of that mortgage was strong evidence of their financial difficulties ; and, considering all the other evidence, and the admissions of the defendants in their cross-examination, I cannot doubt that the real object of the issue of debentures was to meet the pressing liabilities of the company, and not to improve the property or develop the business of the company. I cannot but come to the conclusion that however hopeful the directors may have been of the ultimate success of the company, this statement was such as ought not to have been made. It was said, How could those who advanced the money have relied on this statement as material ? I think it was material. A man who lends money reasonably wishes to know for what purpose it is borrowed, and he is more willing to advance it if he knows that it is not wanted to pay off liabilities already incurred.

[Remainder of opinion omitted.]

BOWEN, L. J. [After stating the requisites of an action for deceit, and commenting upon other alleged misrepresentations.] But when we come to the third alleged misstatement I feel that the plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develop the supply of fish. A mere suggestion of possible purposes to which a portion of the money might be applied would not have

formed a basis for an action of deceit. There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the defendants in raising the money were not those stated in the circular. I will not go through the evidence, but looking only to the cross-examination of the defendants, I am satisfied that the objects for which the loan was wanted were misstated by the defendants, I will not say knowingly, but so recklessly as to be fraudulent in the eye of the law.

Then the question remains: Did this misstatement contribute to induce the plaintiff to advance his money. Mr. Davey's argument has not convinced me that they did not. He contended that the plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact. I have felt some difficulty about the pleadings, because in the statement of claim this point is not clearly put forward, and I had some doubt whether this contention as to the third misstatement was not an afterthought. But the balance of my judgment is weighed down by the probability of the case. What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the plaintiff would be unlike the rest of his race if he was not influenced by the statement of the objects for which the loan was required. The learned judge in the Court below came to the conclusion that the misstatement did influence him, and I think he came to a right conclusion.

[FRY, L. J., delivered a concurring opinion.]

Appeal dismissed.

BOWEN, L. J., IN SMITH v. LAND, &c. CORPORATION.

1884. *Law Reports, 28 Chancery Division*, 15-16.

IN considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement

of opinion about the tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the relations between himself and his tenant; other persons either do not know them at all or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which *prima facie* the vendors know everything and the purchasers nothing. The vendors state that the property is let to a most desirable tenant; what does that mean? I agree that it is not a guarantee that the tenant will go on paying his rent, but it is to my mind a guarantee of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlords and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to what took place between Lady Day and Midsummer, I think that it was not. On the 25th of March, a quarter's rent became due. On the 1st of May, it was wholly unpaid and a distress was threatened. The tenant wrote to ask for time. The plaintiffs replied that the rent could not be allowed to remain over Whitsuntide. The tenant paid on the 6th of May £30, on the 13th of June £40, and the remaining £30 shortly before the auction. Now could it, at the time of the auction, be said that nothing had occurred to make Fleck an undesirable tenant? In my opinion a tenant who had paid his last quarter's rent by dribblets under pressure must be regarded as an undesirable tenant.

SECTION II.

Representation not True in Fact.

KIDNEY v. STODDARD

1843. 7 Metcalf, 252.

TRESPASS upon the case for an alleged fraudulent representation by the defendant as to the credit of his son, Alden D. Stoddard, Jr., in the following letter to F. Delano of New York: "Fairhaven, 9 mo. 27, 1841. Franklin Delano, Esq. My dear Sir: The bearer, my son, A. D. Stoddard, Jr., wishes to purchase a bill of goods in your city. Any assistance you can render him, by a recommendation or otherwise, will be gratefully received by him, and much oblige your obedient servant, who will take the liberty to say that A. D. S. Jr.'s contracts, of whatever nature, will unquestionably be punctually attended to. Very respectfully your friend, A. D. Stoddard."

At the trial before Wilde, J., one Ammidon testified that he was agent of the plaintiffs; that Stoddard, Jr., called on him in New York, about the 1st of October, 1841, to purchase some goods, and referred him to Delano; that the witness called on Delano, who showed said letter to him, and stated that he was not acquainted with the young man, but knew his father and believed him to be a responsible man; that from the knowledge he had of him, he should believe he would see his son through; and that, on the strength of the letter, he should sell the young man goods to the amount of four or five hundred dollars. That the witness, at that time, sold to the son goods to the amount of \$260, and afterwards to the amount of \$158.50. That the son afterwards applied for more goods, but the witness refused to sell to him. The witness testified that he would not have sold him the goods, had it not been for the said letter and the representations of Delano; that no part of the debt had ever been paid; that he had never attempted to recover the amount of the young man; that he had called on the defendant to effect a settlement, and told him that he (the witness) had understood, since the sale, that his son was a minor at the time the letter was written; that the defendant admitted that such was the fact, refused to pay the debt, and stated that his son had gone to sea on a whaling voyage.

There was other evidence to show that the son was a minor when the letter was written, being between twenty and twenty-one years of age, and that he had then been in business, as a dealer in hats, a year or more.

The judge instructed the jury that when a party intentionally conceals a material fact, in giving a letter of recommendation, it amounts

to a false representation; that the defendant, giving a letter in this case to an unlimited amount, was bound to communicate every material fact; that if he concealed the fact that the son was a minor, with the view to give him a credit, knowing or believing that he would not get a credit if that fact was known, it was a fraud, and the plaintiff was entitled to recover; that it was immaterial whether there was any moral fraud; and that every man was presumed to know the consequences of his own acts.

The defendant's counsel requested the judge to instruct the jury, that if the defendant gave his opinion merely, he was not bound to communicate any facts; and that if he gave an honest opinion, he was not liable. But the judge refused so to instruct the jury. It was also contended by the defendant's counsel that the plaintiffs should have made an effort to recover the debt of the son.

The jury found a verdict for the plaintiffs for the amount of the goods sold, and the defendant moved for a new trial, on the ground that the jury were misdirected in matter of law.

Colby, for the defendant.

Eliot, for the plaintiffs.

HUBBARD, J. This cause has been argued with ability and feeling by the counsel for the defendant who, it has been urged, was a father, and whose letter was written with strong expressions of parental confidence and affection, and at the same time without false allegations in it. But while sympathy for a client is highly praiseworthy on the part of counsel, the Court are required not to yield to sympathies, or to give way to compassion; but to administer the law in its integrity, although it may seem to bear hardly in particular instances. To bend the rules of law, to avoid the pressure in individual cases, would produce uncertainty in the law itself, and in the end be subversive of justice.

It is argued that the jury were compelled to find for the plaintiffs, on the mere concealment of a single fact by the defendant; or, in other words, that the charge of the presiding judge was erroneous. But the jury were not directed to return a verdict for the plaintiffs, unless they found, as a fact, that the defendant concealed that his son was a minor, with a view to give him a credit, and knowing or believing that he would not obtain a credit if that fact were known.

It is very certain, as has been maintained by the defendant's counsel, that a mistaken opinion, honestly given, can never be taken as a fraudulent representation. This is true in principle, and supported abundantly by authorities. But the misfortune of the defendant's case is, that the verdict of the jury rests not on the honest mistake of the defendant, but upon the ground of material concealment of a fact especially within his knowledge; a fact important to be known, as it regarded the credit of the son; a fact designedly concealed, and with the view of obtaining that credit for the son, which he, the father, knew or believed he could not obtain if that fact were known.

It needs no lengthened argument to establish the materiality of the

fact. The result of this case is a sufficient witness of it. The plaintiffs were induced by the letter, from which this fact was carefully excluded, to give a credit to the son, which they would not otherwise have given; and as the direct consequence of it, they have sustained the loss set out in the declaration. Here then are proved fraud and deceit on the part of the defendant, and damage to the plaintiffs; and these facts have long been held to constitute a substantial cause of action. From the time of the judgment in the great case of *Pasley v. Freeman*, 3 T. R. 51, to the present day, through the long line of decisions both in England and America, the principle of that case, though with some statute modifications, remains unshaken and unimpaired.

The case at bar has been likened to that of *Tryon v. Whitmarsh*, 1 Met. 1; and the letters in the two cases have much similarity. But in that case, in which the authorities were carefully examined by the Court, it was decided that the letter might have been written with an honest conviction of the truth of the assertions contained in it. But in the case at bar, there was the designed concealment of a fact, with intent to procure a credit, which could not be obtained if the fact were made known; and this the defendant well knew or believed. We think that the principles laid down in that case, though the verdict was set aside, are decisive of the present case. The Court there say, "We are therefore of opinion that the question for the jury was, whether the defendant knew that the assertion or opinion contained in his letter was false, or that he did not fully believe it to be true; or whether he did not conceal a material fact from the knowledge of the plaintiffs, with the intention to deceive them. It is true, as the defendant's counsel have argued, that the defendant was not bound to disclose the facts on which his opinion was founded; but if he kept back any material fact, with the intent to deceive the plaintiffs, this would be fraudulent." So in *Lobdell v. Baker*, 1 Met. 201, a case, though very different in its facts, yet having features of resemblance to this, the Court say, "There was no evidence that the defendant made any express declaration that the note sold was a valid note, and that the makers and indorsers were liable; but we are all of opinion that if he fraudulently procured the indorsement of Swan, and then authorized Winslow to sell the note, without erasing the name of Swan, knowing as he did that Swan was a minor, and not by law liable on the note, all this would be equivalent to an express affirmation that the note was a valid contract, on which the makers of the note and the indorsers were by law liable."

It was also argued, in arrest of judgment, that the plaintiffs could not recover, because they had made no attempt to procure the debt from the son; but it being apparent that the declaration set forth a good cause of action, the defendant's counsel, waiving the motion in arrest, argued that the plaintiffs had not made out a case for damages, because they had not prosecuted the claim against the son to final

judgment; as infancy is only a personal privilege, and there is no certainty he would take advantage of it, and the Court cannot presume that he will not pay an honest debt. But the son did not pay the demand when due. The plaintiffs therefore sustained the loss of which they complain, by reason of the false representation; and the injury being complete, the cause of action accrued without prosecuting a suit against the son. And supposing the question turned on the point whether the plaintiffs had used due diligence to collect the demand of the son; then it might well be replied that when the plaintiffs came to the knowledge of the fact that the son was a minor, and applied to the father for a settlement, he refused to pay the debt, and informed them that his son had gone to sea on a whaling voyage. If therefore the plaintiffs had been bound to pursue the son in the first instance, — as we think they were not, — still this state of facts would have justified them in not prosecuting the son before looking to the father for redress; nor does it call on them to await his return. *Ad vana seu impossibilia non cogit lex.* The jury then having established the fraud and deceit on the part of the defendant, and the damage to the plaintiffs, the motion to set aside the verdict is overruled.

Judgment on the verdict.

LORD CAIRNS, IN PEEK v. GURNEY.

1873. *Law Reports*, 6 *House of Lords*, 403.

MERE non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.

MITCHELL, J., IN NEWELL v. RANDALL.

1884. 32 *Minnesota*, 172-173.

It is doubtless the general rule that a purchaser, when buying on credit, is not bound to disclose the facts of his financial condition. If he makes no actual misrepresentations, if he is not asked any questions, and does not give any untrue, evasive, or partial answers, his mere silence as to his general bad pecuniary condition, or his indebtedness, will not constitute a fraudulent concealment. 2 Pom. Eq. Jur.

§ 906 ; Bigelow on Fraud, 36, 37. But this was not a case of mere passive non-disclosure. The object of De Laittre's inquiry clearly was to ascertain Bauman's financial condition and ability to pay. Bauman's statement was in response to that inquiry, and, when he undertook to answer, he was bound to tell the whole truth, and was not at liberty to give an evasive or misleading answer, which, although literally true, was partial, containing only half the truth, and calculated to convey a false impression. The natural construction which would, under the circumstances, be put on this statement is that he had \$3,300 capital in his business. It was couched in language calculated to negative the idea that this was merely the gross amount of his assets, and that he owed debts to the extent of two-thirds or the whole of that amount. Such a statement, made under the circumstances it was, might fairly and reasonably be understood as amounting to a representation that he had that amount of capital which was and would remain available, out of which to collect any debt which he might contract with plaintiff. We think this is the way in which men would ordinarily have understood it. It is immaterial that more explicit inquiries by plaintiff would have disclosed the fact of his indebtedness. It does not lie in Bauman's mouth to say that plaintiff relied too implicitly on this general statement. To tell half a truth only is to conceal the other half. Concealment of this kind, under the circumstances, amounts to a false representation.

SECTION III.

Defendant's Belief as to Truth of Representation.

MAHURIN v. HARDING.

1853. 28 *New Hampshire*, 128.

TRESPASS on the case. The declaration was as follows : In a plea of trespass on the case, for that the said J. & J. (defendants), on &c., at &c., being possessed of one mare, of a dark brown color, which mare was unsound and infected with a bad and inveterate disease, commonly called glanders, which rendered the said mare good for nothing ; and the plaintiff being then and there also possessed of another mare, of a bay color, of his own proper mare, of the value of \$100 ; the defendants, to induce the plaintiff to exchange with them, did then and there falsely and fraudulently affirm to the plaintiff that their, the said defendants', mare was then well, good, and sound, with the exception of " a slight touch of the heavens ;" whereupon the plaintiff, giving full credit to said defendants' said affirmation, was instantly induced to and did then and there deliver his said bay mare to the defendants in exchange

for said defendants' brown mare as aforesaid; and the said defendants did then and there deliver their said brown mare to the plaintiff in exchange for the plaintiff's said bay mare, and also did then and there give to the plaintiff one suckling colt, of the value of twenty dollars, and also gave to the plaintiff one joint and several note for thirty dollars, and one other joint and several note for five dollars, as boot between said mares. Now the plaintiff in fact says, that the defendants' mare aforesaid was not, at the time of the delivery, exchange, and affirmation aforesaid, well, sound, or good; but that said mare was then and there infected with and labored under a bad and inveterate disease, called glanders, as aforesaid, which made said mare utterly unfit for any service and good for nothing, and soon after died of the said glanders, as aforesaid; of all which the said defendants were then and there well knowing. And so the said defendants, by means of their said false affirmation, have greatly injured and defrauded the plaintiff to his damage, &c.

Upon the trial on the general issue, the Court instructed the jury that the plaintiff must prove that the affirmation was both false and fraudulent, that in this State the defendant is liable to arrest for a fraudulent affirmation, by which the plaintiff has suffered damage, but not for a mere breach of contract, and that in other respects the distinction between tort and contract is material and should be regarded, and therefore if they found that the defendants stated as a fact for the plaintiff to rely upon, that the mare was sound (with the exception named in the writ), and found that she was not sound; yet if the defendants made this statement in entire good faith, fully believing it to be true, they are not liable in this form of action; but if the affirmation was known, or believed, or suspected by them to be false, and the event proved that it was so, it should be deemed fraudulent.

The jury found a verdict for the defendants, which the plaintiff moved to set aside because of said instructions.

Burns & Fletcher, for the plaintiff.

J. W. & G. C. Williams, for the defendants.

BELL, J. The declaration in this case is in trespass on the case for deceit in a sale.

It is said in some of the books that assumpsit and case for deceit are in certain cases concurrent remedies for the same injuries in the sale of horses; and to some extent this is true.

Where a seller is chargeable upon an implied warranty of title, or where he makes an express warranty, or makes such statements as to the quality of the article he sells as he intends the purchaser shall rely upon, and which in law constitute a warranty: *Morrill v. Wallace*, 9 N. H. Rep. 111; *Whitney v. Sutton*, 10 Wend. 413; *Cook v. Mosely*, 13 Wend. 277; while at the same time he knows them to be false, and intends by them to deceive and impose upon the purchaser, the buyer may seek his redress either by action of assumpsit upon his warranty, or by action of deceit for the fraud. *Stuart v. Wilkins*, Doug. 21;

Williamson v. Allison, 2 East, 446; *Wallace v. Jarman*, 2 Stark. 162; *Wardell v. Davis*, 13 Johns. 325; *Cravens v. Grant*, 4 Mon. 126; 2 Stephen's N. P. 1285.

The warranty is none the less a contract because it is the means by which a fraud is accomplished, and the fraud is in no way diminished, because the seller has at the same time bound himself by a warranty.

But these remedies, though concurrent, and though they entitle the sufferer to the same measure of redress in damages, are by no means identical. The distinction between the two classes of actions, as being founded respectively on tort and on contract, is nowhere neglected or disregarded. There are substantial differences at common law, and, as remarked by the learned judge who tried this case, in his charge to the jury, the distinction is not merely formal, but in the present state of our law there is a substantial difference, which must not be overlooked. In tort, here, there is a remedy against the person, which ordinarily does not exist in actions on contracts.

The forms of declaring in these cases are substantially different. The declaration in *assumpsit* always states a consideration and a promise or warranty, and complains of a breach of the warranty. 1 Ch. Pl. 99; Saund. Pl. and Ev. 111; *Carley v. Wilkins*, 6 Barb. S. C. 557; *Edick v. Crim*, 10 Barb. S. C. 445. The contract to warrant, of the breach of which the plaintiff complains, and the entire consideration for it, is indispensable to be stated. *Miles v. Sheward*, 8 East, 7; *Webster v. Hodgkins*, 5 Foster's Rep. 128.

In this action [*i. e.* *assumpsit*] the allegations very often introduced, that the defendant intended to defraud, that he knew his warranty to be false, and that he thereby deceived and defrauded the plaintiff, are immaterial, and need not to be proved. The defendant is bound to answer for his false warranty, whether he knew it to be false or not; whether he intended a fraud, or acted with entire good faith, and fully believed it to be true. *Denison v. Ralphson*, 1 Vent. Rep. 366; *Northcote v. Maynard*, 3 Keb. 807; Anon. Lofft, 146; *Gresham v. Postan*, 2 C. & P. 540; *Bayard v. Malcom*, 1 Johns. 453, 2 Johns. 550; *Case v. Boughton*, 11 Wend. 107; *Carley v. Wilkins*, *supra*.

The declaration for deceit alleges that the defendant induced the plaintiff to purchase an article by a warranty or by statements which he knew to be false, and thereby deceived and defrauded him. *Evertson v. Miles*, 6 Johns. 138; *Case v. Boughton*, *supra*; *Carley v. Wilkins*, *supra*; *Edick v. Crim*, *supra*. And this is all that is essential to be alleged. *Barney v. Dewey*, 13 Johns. 224; *Weeks v. Burton*, 7 Vt. Rep. 67. It is not necessary to make any allegation in relation to the consideration or the terms of the contract of sale, unless they happen to be connected with the fraud alleged, in that case, though if a party incautiously recites the particulars of such a contract, he may be compelled to prove them as he states them, and may fail if any material variance occurs in his proof. *Weall v. King*, 12 East, 452; *Jones v. Cowley*, 4 B. & C. 446; *Hands v. Burton*, 9 East, 349; *Morris v.*

Littlegoe, 2 Smith, 394; *Blyth v. Bampton*, 3 Bing. 472; *Webster v. Hodgkins*, *ub. sup.*; *Hart v. Dixon*, 1 Sel. N. P. 104; 2 N. H. Rep. 291; *Barney v. Dewey*, *supra*; *Corwin v. Davidson*, 9 Cow. 22; *Porter v. Talcott*, 1 Cow. 359.

But the intention to defraud, the knowledge that his warranty or his statements were false, and the fact that the plaintiff was thereby defrauded, constitute, in cases of this kind, the very gist and foundation of the action for deceit, and they must be proved, or the action must fail. *Springwell v. Allen*, Aleyn, 91; *Parkinson v. Lee*, 2 East, 313; *Dowding v. Mortimer*, 2 East, 449 n.; 2 Stark. Ev. 266; 2 St. N. P. 1286; *Dale's Case*, Cro. El. 44; *Turner v. Brent*, 12 Mod. 245; 1 Com. Dig. *Action for Deceit*, A. 8. A. 11, E. 4; *Evertson v. Miller*, 6 Johns. 138; *Young v. Covell*, 8 Johns. 23; *Addington v. Allen*, 11 Wend. 375.

A seller may in good faith make statements as to the qualities of the articles he sells, believing them to be true, and intending that the purchaser should rely upon them, either in the form of explicit warranties, or of such representations as in law constitute warranties, and the purchase may be made in reliance upon their truth; but the seller is guilty of no fraud or deceit, for bad faith and a design to deceive are essential elements of every fraud, or deception; and though he may be liable upon his warranty, yet no action, founded on fraud or deceit, will lie in such case. *Stone v. Denny*, 4 Met. 151; *Rubber Co. v. Adams*, 23 Pick. 256; *Emerson v. Brigham*, 10 Mass. Rep. 197; *Kingsbury v. Taylor*, 29 Maine Rep. 508; *Hazard v. Irwin*, 18 Pick. 95; *Shrewsbury v. Blunt*, 2 M. & G. 475; *Freeman v. Baker*, 5 B. & Ad. 797; *Page v. Bent*, 2 Met. 371.

It is on this principle that it has in many cases been made a serious question, what form of allegation was sufficient distinctly to express this charge. *Chandler v. Lopus*, Cro. Jac. 4; *Medina v. Stoughton*, 1 Salk. 210; s. c. 1 Ld. Ray. 593; *Leakins v. Chissell*, Sid. 146; *Northcote v. Maynard*, *supra*; *Cross v. Garnett*, 3 Mod. 261; *Warner v. Tallard*, Rolle's Ab. 91; *Elkins v. Tresham*, 1 Lev. 102; 1 Bac. Ab. 80; *Bayard v. Malcom*, *supra*; *Lysney v. Selby*, 2 Ld. Ray. 1118; *Harding v. Freeman*, Sty. 310; s. c. 1 Rolle's Ab. 91; 1 Com. Dig. *Action for Deceit*, F. 3, E. 4.

If by the exercise of some ingenuity a declaration could be drawn in such a form that it may seem doubtful whether it is designed to be founded on tort or on contract, and not entirely defective if regarded as either the one or the other, yet it must be held to be founded either in tort or on contract. It cannot be considered as having a double aspect or character, or being either the one or the other, as the exigencies of the case may from time to time happen to require. To allow it such a double character would be contrary to the whole theory of the common law, and would make it a perfect anomaly in legal proceedings.

In former times, the more usual form of declaring in actions upon a

false warranty, was in case for deceit, in which it was more commonly alleged that the defendant *warrantizando vendidit* an article as sound, well knowing that it was not so, though declarations in assumpsit were not uncommon, 2 Inst. Cler. 227; *Butterfield v. Burroughs*, 1 Salk. 211; nor declarations in case without *warrantizando vendidit*. *Firnis v. Leicester*, Cro. Jac. 474; *Roswell v. Vaughan*, Cro. Jac. 196; *Cross v. Garnett*, *supra*; *Kendrick v. Burgess*, Mo. 126.

In *Williamson v. Allison*, 2 East, 445, in 1802, in a declaration upon a *warrantizando vendidit*, it was expressly held, that the declaration was in case for deceit, but that by striking out the averment of the *scienter*, the action might still be maintained in tort, and therefore the *scienter* was not necessary to be proved. It seems to have been decided upon the authority of a *nisi prius* ruling in a case, where it did not appear whether the action was on contract (where the ruling would have been right, but no authority for the case in hand), or in tort; and it was conjectured it must have been in tort, because such was then the more common form of declaring.

This decision seems to have been since followed in some cases in England, *Gresham v. Postan*, *supra*; and is cited in most of the elementary English books on the subject.

It has been followed in Vermont and some of the other States, and has been made the basis of a theory that in actions for deceit in the sale of personal property, if an express warranty is proved, it is not necessary to prove the *scienter*, or any allegation that the false warranty or affirmation was made with any design to deceive. But this idea is not supported by the decision in *Williamson v. Allison*, which is expressly limited to a declaration upon a *warrantizando vendidit*. See 3 Vt. Rep. 53; 10 Vt. Rep. 457; 17 Vt. Rep. 583.

The English case is without authority here, and seems to us entirely unsupported by any authority at common law. And it seems to us entirely inconsistent with the doctrines of the common law to hold that an action for deceit can be sustained without evidence of the intention to deceive. It would be unjustifiable to hold that a man may be imprisoned on execution in an action for a tort, where a court should hold no proof need be produced but of an express contract. In the case of *Crooker v. Willard* (Sullivan, July Term, 1851),¹ it was held, that a count alleging a deceit in a sale in the same form as in *Williamson v. Allison*, could not be joined with one on contract, so far agreeing with that case. But that decision is entirely irreconcilable with the case of *Vail v. Strong*, 10 Vt. Rep. 457, that such a declaration has a double aspect, which makes it join well with assumpsit or trover. And the same view of such a declaration was taken in *Webster v. Hodgkins*, *supra*. With those decisions we remain entirely satisfied.

The present case has a declaration framed upon a different principle. It could not be supported as a declaration on a warranty, on any idea

¹ A note containing a report of *Crooker v. Willard* is omitted. — ED.

of rejecting the allegations importing a charge of fraud, if the cases referred to were not questioned.

It sets forth, that the defendants being possessed of a horse, which was unsound, and the plaintiff of another, of value, the defendants, to induce the plaintiff to exchange with them, did falsely and fraudulently affirm to him, that their horse was sound, and the plaintiff giving credit to their affirmation was induced to exchange, and did so, whereas the defendants' horse was not sound, &c., which they well knew, and so the defendants, by their false affirmation, have greatly injured and defrauded the plaintiff.

This is a common form of declaring in case for deceit. It has no feature of a declaration in assumpsit. It contains no promise, nor undertaking, nor consideration for any. It complains of no breach of any contract, or warranty. It does not even speak of any warranty. Its gist and substance is that the defendants, by their false and fraudulent affirmation, have defrauded the plaintiff, and not by any breach of contract. Assuredly no Court could hold that such a declaration was proved by any evidence which did not establish the fact of fraud, of an intention to deceive, carried into effect by statements known to be false.

As, then, the allegation that the defendants well knew their horse to be unsound, was essential to be inserted in the declaration, either in direct terms, or in expressions of equivalent import, and necessary to be proved, the charge of the Court below was entirely correct, and there must be

Judgment on the verdict.

PEEK v. DERRY ET ALS.

1887. *Law Reports*, 37 *Chancery Division*, 541.

DERRY ET ALS, APPELLANTS v. PEEK, RESPONDENT.

1889. *Law Reports*, 14 *Appeal Cases*, 337.¹

THE action in this case was brought by Sir H. Peek against Mr. W. Derry, the chairman, and Messrs. J. C. Wakefield, M. M. Moore, J. Pethick, and S. J. Wilde, four of the directors of the Plymouth, Devonport and District Tramways Company, claiming damages for the fraudulent misrepresentations of the defendants whereby the plaintiff was induced to take shares in the company.

The company was incorporated in the year 1882 for making and maintaining tramways in Plymouth, Devonport, and Stonehouse. The nominal capital was £125,000 in shares of £10 each.

¹ The arguments are omitted; also that part of the statement relative to plaintiff's reliance on the representation. Only one of the opinions is given in full. — Ed.

The Plymouth, Devonport, and District Tramways Act, 1882 (45 & 46 Vict. c. clix.), by which the company was incorporated, contained the following clause (sect. 35): —

“The carriages used on the tramways may, subject to the provisions of this Act, be moved by animal power, and, with the consent of the Board of Trade, during a period of seven years after the opening of the same for public traffic, and with the like consent during such further periods not exceeding seven years as the said board may from time to time specify in any order to be signed by a secretary or an assistant secretary of the said board, by steam-power or any mechanical power: Provided always, that the exercise of the powers hereby conferred with respect to the use of steam or any mechanical power shall be subject to the regulations set forth in the Schedule A. to this Act annexed, and to any regulations which may be added thereto or substituted therefor by any order which the Board of Trade may and which they are hereby empowered to make from time to time, as and when they may think fit, for securing to the public all reasonable protection against danger in the exercise of the powers by this Act conferred with respect to the use of steam or any mechanical power on the tramways: Provided also, that the company shall not use steam-power or any mechanical power on the said tramways unless and until they shall have obtained the previous consent in writing of the corporations [Plymouth and Devonport] therefor, and then for such terms only and subject to such conditions and regulations as the corporations may from time to time prescribe.”

By sect. 64 it was provided that the company should not open any of the tramways for public traffic without the consent of the corporations.

In October, 1882, the directors issued a prospectus which contained the following paragraph: “As by sect. 35 of the Plymouth and Devonport District Tramways Act, 1882, power is given to use either animal, steam, or mechanical means of locomotion, the directors will adopt that motive power which experience may demonstrate to be at once the most economical and effective.” It did not appear that the plaintiff ever received a copy of this prospectus.

On the 1st of February, 1883, the directors of the company issued a second prospectus, which contained a heading in large type as follows: “Incorporated by special Act of Parliament 45 & 46 Vict. authorizing the use of steam or other mechanical motive power.” The prospectus contained the following paragraphs: —

“One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses.”

“Looking to the exceptional advantages offered by this undertaking, from the dense population of the towns it traverses, the unusually favorable conditions as to motive power open to the company, and the

annual dividends earned by other companies which do not enjoy such special privileges, the directors have reason to believe that the enterprise will prove highly remunerative, and the shares now for subscription offer a very favorable opportunity for a sound and progressive investment."

The defendants at the same time issued a circular letter, which was sent with the prospectus, in which it was stated that "the company by its Act enjoys the special privilege of the right to use steam-power instead of horse-power, from which it is expected considerable savings will result in the working expenses."

The plaintiff received copies of this prospectus and circular, and believing, as he alleged, that the company had an absolute right to use steam and other mechanical power, and relying upon the representations and statements in the prospectus and circular, applied on the 7th of February for 400 shares, for which he paid £4000.

About £40,000 only of the capital was subscribed; but the directors completed part of their tramway in Plymouth. The corporation of Devonport refused their consent to the company opening the completed part until the remaining portion was ready, and on the 14th of November, 1884, obtained an injunction restraining the company from so doing. When the Board of Trade were applied to, they refused to sanction the use of steam-power except over a small portion of the tramways.

The result was that the company was unable to carry out its proposed undertaking, and a petition for winding-up was presented, which was followed by a winding-up order on the 2nd of May, 1885.

The writ in this action was issued on the 4th of February, 1885, a few days after the petition for winding-up, by Sir H. Peek, against the chairman and directors named above, claiming in the first instance a rescission of the contract for shares and repayment of the money paid by him, and damages; but the writ was afterwards amended, and claimed only damages for the misrepresentations in the prospectus and circular.

The defence pleaded by the defendants was that they did not represent, or intend to represent, in the prospectus and circular, that the company had an absolute right to use steam or other mechanical power; that the plaintiff knew that the use of steam power was never, or seldom, given unconditionally to a tramway company, and that he was acquainted, or might have made himself acquainted, with the provisions of the company's special Act, which was referred to in the prospectus, and might be seen at the company's office; and they denied that the plaintiff was induced to take the shares by the representations complained of. They also pleaded that if the statements complained of were untrue, they were made by the defendants in good faith, and that they had reasonable grounds for believing them to be true: that in fact the consent of the corporation of Plymouth to the use of steam was given in June, 1883, and the consent of the Board of Trade to its being used in a portion of the tramways had also been given.

The action came on for hearing before Mr. Justice Stirling. At this hearing the parties testified.

STIRLING, J. [After reciting the statement in the prospectus.] Now, is this statement in the prospectus true or untrue? It is perfectly clear to my mind that it is not an accurate statement of the legal position of the company. At the time when the prospectus was issued the company had not, and could not have, as it appears to me, the absolute legal right to use steam on the tramway. As it seems to me, according to the terms of the section, the consent of the Board of Trade is a condition precedent to the right; and the right is only to be for a period of seven years, and with the like consent during such further periods not exceeding seven years, as the board may from time to time specify. Further, the consents of the corporations had not in form been obtained. And if I had, as might have been the case, to give a decision in an action brought to rescind the contract with a view of getting rid of the shares, I might have felt very considerable difficulty in coming to a conclusion other than this, — that the statement in the prospectus was not in accordance with the rights of the company.

The directors have all given evidence. . . . I have had the opportunity of seeing them in the box. I have attended as closely as I could to their demeanor and to the statements which they have made there, and the impression which is left upon my mind is this, that however much they may have gone wrong in what they did in reference to those sums which they received, still, as regards this prospectus, I cannot bring myself to believe that any one of them acted with an intent to defraud in any way, or was wilfully dishonest. I think that if any one of those gentlemen had been told by Sir Henry Peek, or by any one else, the day after the allotment was made, "You have said in the prospectus something which you had no right to say; you have said you have a right to use mechanical power when you have not," each and every one of them would have stood aghast. I fully believe that each of them thought that the company with which he was connected had the right, as it is put in the prospectus, to use steam.

Now, that does not end the matter. I must further inquire, according to what has been laid down, and in the view which I have proposed to take of the case, did they entertain that belief on reasonable grounds? Now I think I must come to the conclusion that they had reasonable grounds for the belief; at all events, that their grounds for the belief were not so unreasonable as to justify me in holding them guilty of fraud. For what is the state of the case? By the general Tramways Act of 1870,¹ it is provided that all carriages used in any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only. There-

¹ 33 & 34 Vict. c. 78, s. 34.

fore, in a general way, unless the right to use mechanical power is conferred by the special Act, it cannot be used at all. That being so, it is of the greatest importance that there should be found in the special Act something authorizing the use of mechanical power. Now there is in this Act a section which, subject to fetters and limitations no doubt, does authorize the use of mechanical power. The mere existence of that section shows to my mind that, even subject to the fetters and limitations which are there introduced, Parliament had to a certain extent adjudicated upon the subject and come to the conclusion that this was not a case in which the right to use mechanical power should be absolutely refused to the company. So much I think must be inferred from the Act of Parliament itself. Then, no doubt, there are fetters and limitations imposed by the Act. But I conceive that if any one of these gentlemen had had his attention called to that as showing that he had no right to assert that the company could use steam, he would have said: "You may be right as a matter of law, but as a matter of business I say the statement is perfectly correct. It is true we have got to get the consent of the Board of Trade and of the two corporations; but as to the consent of the two corporations, we have got that already practically; there is no opposition, and there can be no question that that will be given." Well, was that inference unjustifiable? No, I think not. In fact the corporations shortly afterwards passed resolutions authorizing the use of steam. Then as to the Board of Trade. What was the justification as to the Board of Trade? It is not to be forgotten that, in my view, there is a special power given to the Board of Trade here beyond that which is conferred by the general Tramways Act with reference to the inspection and opening of the line. The general Tramways Act prohibits the line from being opened until it has been inspected by the Board of Trade and certified to be fit for traffic, but beyond that there is here a duty cast on the Board of Trade of saying whether mechanical power shall be used in the tramway at all. But, after all, was this, as a matter of business, a thing which it was unreasonable for the directors to suppose could be got? The Board of Trade is a public body. It is one of the great departments of state, and the head of it is a public minister. Therefore it does not act in an arbitrary way, and even if it were inclined to do so, it would be under the control of Parliament; and if it had to enforce its decisions, it would also to a certain extent be under the control of the law officers of the Crown. But that is not all. The Board of Trade has been in existence for a long time, and its mode of proceeding is well known to everybody who takes any interest in the subject, and it is perfectly well known that it does not proceed in an arbitrary way, and its decisions commend themselves to men of business and to men of experience in regard to railways and tramways, and they know very well that when the duty is cast upon the Board of Trade of considering the opening of the line, the Board will not merely, because it chooses to say so, stop the opening of the line, but will go into the matter, and consider

the requirements of the public safety, and that if the Board is satisfied as to that, there is no risk of the requisite consent being withheld. Then, although there was in this case a special duty thrown upon the Board of Trade, it seems to me that the directors might not unreasonably come to the conclusion, as I believe they did, that it was a mere matter of requirements after all, — that the Board of Trade would no doubt insist on certain things being done, and on certain things being avoided, but that it was a mere matter of money and expenditure to comply with the requirements of the Board, and that if those requirements were complied with there was no practical danger that the consent would be refused.

Now, in my judgment, having seen the directors and come to the conclusion that they did, every one of them, believe that they had the right stated in the prospectus, am I to say that their belief was so unreasonable, and so unfounded, and their proceedings so reckless or careless that they ought to be fixed with the consequences of deceit? In my judgment I think not. Mercantile men dealing with matters of business would be the first to cry out if I extended the notion of deceit into what is honestly done in the belief that these things would come about, and when they did not come about make them liable in an action of fraud. I cannot, therefore, under these circumstances, come to the conclusion that this was fraudulent in any sense which would render these defendants liable to an action for deceit.

[The learned Judge was also of opinion that the plaintiff had not proved that he relied on the statement in the prospectus.]

The action was ordered to be dismissed with costs.

From this judgment of Stirling, J., the plaintiff appealed.

On appeal, the judgment was reversed by COTTON, HANNEN, and LOPES, L. JJ.

Portions of the opinions were as follows : —

COTTON, L. J. Then the next point to be considered is what in fact is the statement which is relied upon as misleading? I think there are two statements relied upon. First, there is the heading of this prospectus, which was of the 29th of January, 1883. It was this: "Incorporated by special Act of Parliament 45 & 46 Vict. authorizing the use of steam or other mechanical motive power." That was not so much relied upon, and might, I think, be explained away. What was really relied upon was this: "One great feature of this undertaking, to which considerable importance should be attached, is that by the special Act of Parliament the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses."

Now, what was the position of things at this time? By the general Act, unless the special Act authorized it, no motive power could be used except horses. In the 35th section of the special Act there was a

provision that "carriages used on the tramways may, subject to the provisions of this Act, be moved by animal power, and, with the consent of the Board of Trade during a period of seven years after the opening of the same for public traffic, and with the like consents during such further period not exceeding seven years as the said board may from time to time specify in any order signed by the assistant-secretary or secretary, by steam-power or any mechanical power." It might be said, and it was said in argument, that the general Act divided tramway companies into two classes, viz., those which could only use horse-power and those which could also use steam-power; and that this ought to be read as bringing this company within the division of companies which are freed from the restrictions in the Act of 1870, and have got themselves put by Parliament into another position; of being in the second class of tramway companies, which could use not only horse-power but also steam-power. But can that be said to be the meaning of this statement? In my opinion it cannot, because it does not speak of this as an Act of Parliament removing the restriction of the general Act, and as giving them power probably to obtain authority to use steam-power, but it speaks of the company having the right, which must, in my opinion, be the then present right, at the time when the prospectus was issued, to use steam-power. It does not state that, if they get authority from the Board of Trade to use this, then the probable result will be that the working expenses will be greatly diminished, but speaks of this right to use steam-power as that which is so within the power of the directors that by that means the company will as a fact, and not as a mere prospective probable advantage, be enabled to reduce considerably the working expenses. That agrees with the heading, which points out, not that it is a company which is allowed by Act of Parliament to get this power, but speaks of it as a company which actually, in fact, has the power to do that which will be a considerable saving of expense, and will make it, therefore, a much more profitable company than it would otherwise be. That in my opinion is the real meaning, and the fair construction of that statement contained in the prospectus.

As far as I see, the great contention on behalf of the directors was not that which I have suggested might be the construction, but it was partly this, that the mere approval on behalf of the Board of Trade of the plans which were submitted to them was equivalent to giving the consent required by that section; and this, I think, is what was adopted by Mr. Justice Stirling, viz., that it was so probable that the Board of Trade would give the consent that the directors were justified in making this statement. Now, as regards the latter point, I do not think the probability that they would obtain this authority from the Board of Trade is equivalent to the statement which was made. If such a statement had been made, there could have been no question. Of course, they are not liable for merely expressing an opinion which they might well and honestly entertain, and I think probably did enter-

tain, that the Board of Trade would grant their consent. But the statement is not to that effect, but is, in my opinion, a statement that they have, at the present moment, power to use steam.

I think that contention cannot assist the directors in such a matter as this, where the statement is of a positive fact. I think the plaintiff has a right to insist that the defendants are liable for the ordinary meaning of the words used, because, however much people in their own minds may mean to qualify their statements, if a man makes a statement which, according to its ordinary meaning, bears a particular construction, he, in my opinion, is liable to those who, reading it and construing it reasonably, do put upon it the primary meaning and the fair construction of the words used. And here we find on the evidence (and I think Mr. Justice Stirling relied on the plaintiff's statement) the plaintiff does state in his evidence that he did treat this as a statement that the company had the absolute right to use steam power for the purposes of locomotion.

I have come to the conclusion (I think not differing from Mr. Justice Stirling in that) that this was a statement that they had at that moment the absolute power, without any restriction, to use steam for the purpose of propelling their carriages, and that this was false.

Then we must consider this further point, which, of course, it is necessary for the plaintiff to make out. Had the defendants reasonable ground for believing the statement to be true? What is said by the defendants? Some of the defendants say that they knew what the rights were, and they knew that no consent had been given by the Board of Trade.

I understand Mr. Justice Stirling's view with regard to the reasonable ground to be this. He thought that they had reasonable ground as men of business for believing that in fact this consent of the Board of Trade would be obtained. I think if it turned upon that I should agree with him. Probably they would expect this, although some of them afterwards thought it would not be desirable that steam-power should be employed upon the line. I do not rely upon that. But I think they may have thought the Board of Trade would probably grant it. That, as I say, does not make true that statement which in fact they made, although a very little alteration would have made the statement which they made true in fact, if they had only said, "subject to the consent of the Board of Trade." Then there would not have been that misstatement, and it could not have been said that by any misstatement on their part the plaintiff had been induced to take the shares.

HANNEN, J. But Mr. Justice Stirling then proceeds to deal with the facts. His judgment seems to amount to this: that because there was a possibility of the sanction of the Board of Trade being obtained, and the defendants believed they would obtain that sanction in the future as

a matter of course, that was a reasonable ground for stating that they had it in the present. I can only say with great regret that I entirely differ from that view. It appears to me that nothing can morally justify a man in stating a thing as a fact, as existing at present, because he expects that it will exist in the future. And when Mr. Justice Stirling says that mercantile men dealing with matters of business would be the first to cry out if he extended the notion of deceit into what is honestly done in the belief that these things would come about, I can only say that there are two classes of mercantile men. There are those who have lax notions of the duty of taking care to be accurate, and those who are scrupulously careful to observe this duty; and it is the opinion of the latter class to which I attach most importance.

LOPES, L. J. I come to the conclusion that a reader of ordinary intelligence would understand that in that prospectus was contained a definite assertion of a then existing fact, that is, a right to use steam-power. I cannot think that any reader of ordinary intelligence reading those passages would come to the conclusion that it meant only an assertion of what I call a violent probability, — that a consent to use steam-power would be obtained.

If that is the meaning, then the question arises, was it a false statement? It seems to me that that is a matter which cannot be contested and which in point of fact was not contested. It is perfectly clear by reference to the special Act that no steam-power could be used without the consent of the Board of Trade and the two corporations of Plymouth and Devonport.

The defendants, Derry *et als*, appealed from the decision of the Court of Appeal to the House of Lords.¹

Sir Horace Davey, Q. C., and *Moulton*, Q. C. (*Mr. Muir Mackenzie* with them), for appellants.

Bompas, Q. C., and *Byrne*, Q. C., (*Patullo* with them), for respondent.

The decision of the Court of Appeal was reversed by the unanimous decision of LORDS HALSBURY, WATSON, BRAMWELL, FITZGERALD, and HERSCHELL; all of whom delivered opinions.

Some portions of the opinions of Lord Halsbury and Lord Bramwell are given below. The opinion of Lord Herschell is given in full.

LORD HALSBURY, L. C. My Lords, when I turn to the question of fact¹ I confess I am not altogether satisfied. In the first place I think the statement in the prospectus was untrue, — untrue in fact, and to the minds of such persons as were likely to take shares I think well calculated to mislead. I think such persons would have no idea of the technical division between tramways that had rights to use mechanical

¹ "The whole evidence given on this appeal has been laid before your Lordships, . . ." LORD FITZGERALD; L. R. 14 App. Cas. p. 357. — ED.

means and tramways that had not. What I think they would understand would be that this particular tramway was in an exceptionally advantageous position, — that the statement was of a present existing fact, that it had at the time of the invited subscription for shares the right to use steam. And I think such a statement if wilfully made with the consciousness of its inaccuracy would give rise to an action for deceit, provided that damage had been sustained if a person had acted upon a belief induced by such a prospectus.

But upon the question whether these statements were made with a consciousness of their misleading character, I cannot but be influenced by the opinions entertained by so many of your Lordships that they are consistent with the directors' innocence of any intention to deceive.

The learned judge who saw and heard the witnesses acquitted the defendants of intentional deceit, and although the Court of Appeal held them liable, overruling the decision of the learned judge below, they appear to me to have justified their decision upon grounds which I do not think tenable, namely, that they, the directors, were liable because they had no reasonable ground for the belief which nevertheless it is assumed they sincerely entertained.

LORD BRAMWELL. The alleged untrue statement is that "The company has the right to use steam or mechanical power instead of horses," and that a saving would be thereby effected. Now, this is certainly untrue, because it is stated as an absolute right, when in truth it was conditional on the approval of the Board of Trade, and the sanction or consent of two local boards; and a conditional right is not the same as an absolute right. It is also certain that the defendants knew what the truth was, and therefore knew that what they said was untrue. But it does not follow that the statement was fraudulently made. There are various kinds of untruth. There is an absolute untruth, an untruth in itself, that no addition or qualification can make true; as, if a man says a thing he saw was black, when it was white, as he remembers and knows. So, as to *knowing* the truth. A man may know it, and yet it may not be present to his mind at the moment of speaking; or, if the fact is present to his mind, it may not occur to him to be of any use to mention it. For example, suppose a man was asked whether a writing was necessary in a contract for the making and purchase of goods, he might well say "Yes," without adding that payment on receipt of the goods, or part, would suffice. He might well think that the question he was asked was whether a contract for goods to be made required a writing like a contract for goods in existence. If he was writing on the subject he would, of course, state the exception or qualification.

Now, consider the case here. These directors naturally trust to their solicitors to prepare their prospectus. It is prepared and laid before them. They find the statement of their power to use steam without qualification. It does not occur to them to alter it. They swear they had no fraudulent intention. At the very last they cannot

see the fraud. There is their oath, their previous character unimpeached, and there is to my mind this further consideration: the truth would have served their purpose as well. "We have power to use steam, etc., of course with the usual conditions of the approval of the Board of Trade and the consent of the local authorities, but we may make sure of these being granted, as the Board of Trade has already allowed the power to be inserted in the Act, and the local authorities have expressed their approbation of the scheme." (See plaintiff's answer, 313,¹ which shows that he would have been content with that statement.)

During the argument I said I am not sure that I should not have passed the prospectus. I will not say so now, because certainly I would not pass it now after knowing the unfortunate use made of the statement, and no one can tell what would have been the state of his mind if one of the factors influencing it was wanting. But I firmly believe it might have been, and was, honestly done by these defendants. Stirling, J., saw and heard them, and was of that opinion.

LORD HERSCHELL. My Lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

"This action is one which is commonly called an action of deceit, a mere common-law action." This is the description of it given by Cotton, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

¹ The references are to the Appendix printed for the House.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes v. Lock*, 10 Ves. 470, may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in *Brownlie v. Campbell*, 5 App. Cas. p. 935, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeal in the case before your Lordships. "An action of deceit is a common-law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit." This was the language of Cotton, L. J., in *Arkwright v. Newbould*, 17 Ch. D. 320. It was adopted by Lord Blackburn in *Smith v. Chadwick*, 9 App. Cas. 193, and is not, I think, open to dispute.

In the Court below Cotton, L. J., said: "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed, or any one of the class to whom it was addressed, and who was materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement, careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground

for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action.

That the learned Lord Justice thought that if a false statement were made without reasonable ground for believing it to be true an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated amongst persons in order to induce them to take shares, "there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others."

The learned judge proceeds to say: "Although in my opinion it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty, that is to say, an untrue statement made without any reasonable ground for believing that statement to be true; and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them."

Now I have first to remark on these observations that the alleged "right" must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statement of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue statement without any reasonable ground for believing it to be true. I have further to observe that the Lord Justice distinctly says that if there be such a departure from duty an action of deceit can be maintained, though there be not what he should call fraud. I shall have by-and-by to consider the discussions which have arisen as to the difference between the popular understanding of the word "fraud" and the interpretation given to it by lawyers, which have led to the use of such expressions as "legal fraud," or "fraud in law;" but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavor to show that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the Court of Appeal. Sir James Hannen says: "I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." Again, Lopes, L. J., states what, in his opinion, is the result of the cases. I will not trouble your Lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement, intended to be and in fact relied on by the person to whom it is made, may be sued by the person damaged thereby: "Fourthly, if it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief."

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I need go no further back than the leading case of *Pasley v. Freeman*, 2 Smith's L. C. 74. If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was at all events not so well settled but that a distinguished judge, Grose, J., differing from his brethren on the bench, held that such an action was not maintainable. Buller, J., who held that the action lay, adopted in relation to it the language of Croke, J., in 3 Bulstrode, 95, who said: "Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies." In reviewing the case of *Crosse v. Gardner*, Carth. 90, he says: "Knowledge of the falsehood of the thing asserted is fraud and deceit;" and further, after pointing out that in *Risney v. Selby*, 1 Salk. 211, the judgment proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds: "The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so," the latter words being specially

emphasized. Kenyon, C. J., said: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation stated on the record, by which they sustained damage. Can a doubt be entertained for a moment but that this is injurious to the plaintiffs?" In this case it was evidently considered that fraud was the basis of the action, and that such fraud might consist in making a statement known to be false.

Haycraft v. Creasy, 2 East, 92, was again an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were, "I can assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety." All the judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. Lord Kenyon thought that fraud had been proved because the defendant stated that to be true within his own knowledge which he did not know to be true. The other judges thinking that the defendant's words vouching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose to inquire which view of the facts was the more sound. Upon the law there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made is essential to the maintenance of the action, and that belief in its truth affords a defence.

I may pass now to *Foster v. Charles*, 7 Bing. 105. It was there contended that the defendant was not liable, even though the representation he had made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the Court, Tindal, C. J., saying: "It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad." This is the first of the cases in which I have met with the expression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the Chief Justice intended to indicate any doubt that the act which he characterized as a fraud in law was in truth fraudulent as a matter of fact also. Wilfully to tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

Foster v. Charles, 7 Bing. 105, was followed in *Corbett v. Brown*, 8 Bing. 33, and shortly afterwards in *Polhill v. Walter*, 3 B. & Ad. 114. The learned counsel for the respondent placed great reliance on this case, because although the jury had negatived the existence of fraud in fact the defendant was nevertheless held liable. It is plain, however, that all that was meant by this finding of the jury was that the defendant was not actuated by any corrupt or improper motive, for Lord Tenterden says, "It was contended that . . . in order to maintain this species of action it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which from the mode in which it is made is calculated, to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be in the legal sense of the word a fraud, and for this position was cited *Foster v. Charles*, 7 Bing. 105, to which may be added the recent case of *Corbett v. Brown*, 8 Bing. 33. The principle of these cases appears to us to be well founded, and to apply to the present."

In a later case of *Crawshay v. Thompson*, 4 M. & Gr. 357, Maule, J., explains *Polhill v. Walter*, 3 B. & Ad. 114, thus: "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill v. Walter*, 3 B. & Ad. 114." In the same case, Cresswell, J., defines "fraud in law," in terms which have been often quoted. "The cases," he says, "may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact to the injury of another."

In *Moens v. Heyworth*, 10 M. & W. p. 157, which was decided in the same year as *Crawshay v. Thompson*, 4 M. & Gr. 357, Lord Abinger having suggested that an action of fraud might be maintained where no moral blame was to be imputed, Parke, B., said: "To support that count (viz., a count for fraudulent representation) it was essential to prove that the defendants *knowingly*" (and I observe that this word is emphasized), "by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue."

The next case in the series, *Taylor v. Ashton*, 11 M. & W. 401, is one which strikes me as being of great importance. It was an action brought against directors of a bank for fraudulent representations as to its affairs, whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict was sufficient to render the defendants liable; Parke, B., however, in delivering the opinion of the Court said: "It is insisted

that even that [viz., the gross negligence which the jury had found], accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that independently of any contract between the parties no one can be made responsible for a representation of this kind unless it be fraudulently made. . . . But then it was said that in order to constitute that fraud it was not necessary to show that the defendants knew the fact they stated to be untrue, that it was enough that the fact was untrue if they communicated that fact for a deceitful purpose, and to that proposition the Court is prepared to assent. It is not necessary to show that the defendants knew the facts to be untrue; if they stated a fact which was untrue for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud."

Now it is impossible to conceive a more emphatic declaration than this, that to support an action of deceit fraud must be proved, and that nothing less than fraud will do. I can find no trace of the idea that it would suffice if it were shown that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in making the statements they did, if they had reasonable grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them.

All the cases I have hitherto referred to were in courts of first instance. But in *Collins v. Evans*, 5 Q. B. 804, 820, they were reviewed by the Exchequer Chamber. The judgment of the Court was delivered by Tindal, C. J. After stating the question at issue to be "whether a statement or representation which is false in fact, but not known to be so by the party making it, but, on the contrary, made honestly and in the full belief that it is true, affords a ground of action," he proceeds to say: "The current of the authorities, from *Pasley v. Freeman*, 2 Smith's L. C. 74, downwards, has laid down the general rule of law to be that fraud must concur with the false statement in order to give a ground of action." Is it not clear that the Court considered that fraud was absent if the statement was "made honestly, and in the full belief that it was true"?

In *Evans v. Edmonds*, 13 C. B. 777, Maule, J., expressed an important opinion, often quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said: "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood the representa-

tion may still have been fraudulently made." The foundation of this proposition manifestly is that a person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true.

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it will support an action for deceit. In *Western Bank of Scotland v. Addie*, Law Rep. 1 H. L. Sc. 145, 162, the Lord President told the jury "that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit." Exception having been taken to this direction without avail in the Court of Session, Lord Chelmsford in this House said: "I agree in the propriety of this interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement which he asserts to be the result of a *bonâ fide* belief in its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit."

I think there is here some confusion between that which is evidence of fraud and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was

used in all the cases from *Pasley v. Freeman*, 2 Smith's L. C. 74, down to that with which I am now dealing. Even when the expression "fraud in law" has been employed there has always been present, and regarded as an essential element, that the deception was wilful, either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing.

I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord Cranworth. In delivering his opinion in the same case he said: "I confess that my opinion was, that in what his Lordship (the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

Sir James Hannen, in his judgment below, seeks to limit the application of what Lord Cranworth says to cases where the statement made is a matter of opinion only. With all deference I do not think it was intended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank. When this is borne in mind, and the words which follow those quoted by Sir James Hannen are looked at, it becomes to my mind obvious that Lord Cranworth did not use the words "the opinion which they had formed" as meaning anything different from "the belief which they entertained."

The opinions expressed by Lord Cairns in two well-known cases have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the person sued. I do not think they bear any such construction. In the case of *Reese Silver Mining Co. v. Smith*, Law Rep. 4 H. L. 64, 79, he said: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." This must mean that the persons referred to were conscious when making the assertion that they were ignorant whether it was true or untrue. For if not it might be said of any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently; he must be ignorant

that it is true, for by the hypothesis it is false. Construing the language of Lord Cairns in the sense I have indicated, it is no more than an adoption of the opinion expressed by Maule, J., in *Evans v. Edmonds*, 13 C. B. 777. It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord Cairns speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure.

In *Peek v. Gurney*, Law Rep. 6 H. L. 377, 409, the same learned Lord, after alluding to the circumstance that the defendants had been acquitted of fraud upon a criminal charge, and that there was a great deal to show that they were laboring under the impression that the concern had in it the elements of a profitable commercial undertaking, proceeds to say: "They may be absolved from any charge of a wilful design or motive to mislead or defraud the public. But in a civil proceeding of this kind all that your Lordships have to examine is the question, was there, or was there not, misrepresentation in point of fact? If there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done." In the case then under consideration it was clear that if there had been a false statement of fact it had been knowingly made. Lord Cairns certainly could not have meant that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. All that he there pointed out was that in such a case motive was immaterial; that it mattered not that there was no design to mislead or defraud the public if a false representation were knowingly made. It was therefore but an affirmation of the law laid down in *Foster v. Charles*, 7 Bing. 105, *Polhill v. Walter*, 3 B. & Ad. 114, and other cases I have already referred to.

I come now to very recent cases. In *Weir v. Bell*, 3 Ex. D. 238, Lord Bramwell vigorously criticised the expression "legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

In the same case Cotton, L. J., stated the law in much the same way as he did in the present case, treating "recklessly" as equivalent to "without any reasonable ground for believing" the statements made. But the same learned judge in *Arkwright v. Newbold*, 17 Ch. D. 301, laid down the law somewhat differently, for he said: "In an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." And his exposition of the law was substantially the same in *Edgington v. Fitzmaurice*, 29 Ch. D. 459. In this latter case Bowen, L. J., defined

what the plaintiff must prove in addition to the falsity of the statement, as, "secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false."

It only remains to notice the case of *Smith v. Chadwick*, 20 Ch. D. 27, 44, 67. The late Master of the Rolls there said, "A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." This, like everything else that fell from that learned judge, is worthy of respectful consideration. With the last sentence I quite agree, but I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie.

It must be remembered that it was not requisite for Sir George Jessel in *Smith v. Chadwick*, 20 Ch. D. 27, 44, 67, to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms: "On the whole I have come to the conclusion that this, although in some respects inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and *bonâ fide* statement on the part of the defendants, and by no means exposes them to an action for deceit."

I may further note that in the same case, Lindley, L. J., said: "The plaintiff has to prove, first, that the misrepresentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the defendants, or at all events that they did not believe the truth of it." This appears to be a different statement of the law to that which I have just criticised, and one much more in accord with the prior decisions.

The case of *Smith v. Chadwick* was carried to your Lordships' House. 9 App. Cas. 187, 190. Lord Selborne thus laid down the law: "I conceive that in an action of deceit it is the duty of the plaintiff to establish two things; first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and secondly, he must establish that this fraud was an inducing cause to the contract." It will be noticed that the noble and learned Lord regards the proof of

actual fraud as essential; all the other matters to which he refers are elements to be considered in determining whether such fraud has been established. Lord Blackburn indicated that although he nearly agreed with the Master of the Rolls, that learned judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is impossible to read his judgment in this case, or in that of *Brownlie v. Campbell*, 5 App. Cas. 925, without seeing that in his opinion proof of actual fraud or of a wilful deception was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley v. Freeman*, 2 Smith's L. C. 74, down to *Western Bank of Scotland v. Addie*, Law Rep. 1 H. L. Sc. 145, in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir v. Bell*, 3 Ex. D. 238, where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view, it is treated as established law. The *dictum* of the late Master of the Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls

far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor v. Ashton*, 11 M. & W. 401, appears to me to be in direct conflict with the *dictum* of Sir George Jessel, and inconsistent with the view taken by the learned judges in the Court below. I observe that Sir Frederick Pollock, in his able work on Torts* (p. 243, note), referring, I presume, to the *dicta* of Cotton, L. J., and Sir George Jessel, M. R., says that the actual decision in *Taylor v. Ashton*, 11 M. & W. 401, is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie v. Campbell*, 5 App. Cas. p. 952, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements made under such circumstances are true should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal

feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they fraudulently represented that by the special Act of Parliament which the company had obtained they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts. Before considering whether the charge of fraud is proved, I may say that I approach the case of all the defendants, except Wilde, with the inclination to scrutinize their conduct with severity. They most improperly received sums of money from the promoters, and this unquestionably lays them open to the suspicion of being ready to put before the public whatever was desired by those who were promoting the undertaking. But I think this must not be unduly pressed, and when I find that the statement impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion.

I must further remark that the learned judge who tried the cause, and who tells us that he carefully watched the demeanor of the witnesses and scanned their evidence, came without hesitation to the conclusion that they were witnesses of truth, and that their evidence, whatever may be its effect, might safely be relied on. An opinion so formed ought not to be differed from except on very clear grounds, and after carefully considering the evidence, I see no reason to dissent from Stirling, J.'s, conclusion. I shall therefore assume the truth of their testimony.

I agree with the Court below that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were, but to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your Lordships must consider what were the circumstances. By the General Tramways Act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only. 33 & 34 Vict. c. 78, s. 34. In order therefore to enable the company to use steam-power, an Act of Parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the Board of Trade. It was therefore incorrect to say that the company had the right to use steam; they would only have that right if they obtained the consent of the Board of Trade. But it is impossible not

to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting the plans to the Board of Trade, obtained a special Act empowering the use of steam. It might well be that the fact that the consent of the Board of Trade was necessary would not dwell in the same way upon their minds if they thought that the consent of the Board would be obtained as a matter of course if its requirements were complied with, and that it was therefore a mere question of expenditure and care. The provision might seem to them analogous to that contained in the General Tramways Act, and I believe in the Railways Act also, prohibiting the line being opened until it had been inspected by the Board of Trade and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn now to the evidence of the defendants. I will take first that of Mr Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the Bar and a director of one of the London tramway companies. He states that he was aware that the consent of the Board of Trade was necessary, but that he thought that such consent had been practically given, inasmuch as, pursuant to the Standing Orders, the plans had been laid before the Board of Trade with the statement that it was intended to use mechanical as well as horse-power, and no objection having been raised by the Board of Trade, and the bill obtained, he took it for granted that no objection would be raised afterwards, provided the works were properly carried out. He considered, therefore, that practically and substantially they had the right to use steam, and that the statement was perfectly true.

Mr. Pethick's evidence is to much the same effect. He thought the Board of Trade had no more right to refuse their consent than they would in the case of a railway; that they might have required additions or alterations, but that on any reasonable requirements being complied with they could not refuse their consent. It never entered his thoughts that after the Board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent.

Mr. Moore states that he was under the impression that the passage in the prospectus represented the effect of sect. 35 of the Act, inasmuch as he understood that the consent was obtained. He so understood from the statements made at the board by the solicitors to the company, to the general effect that everything was in order for the use of steam, that the Act had been obtained subject to the usual restrictions, and that they were starting as a tramway company, with full power to use steam as other companies were doing.

Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt about it. It

never occurred to him to say anything about the consent of the Board of Trade, because as they had got the Act of Parliament for steam he presumed at once that they would get it.

Mr. Derry's evidence is somewhat confused, but I think the fair effect of it is that though he was aware that under the Act the consent of the Board of Trade was necessary, he thought that the company having obtained their Act, the Board's consent would follow as a matter of course, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He believed at that time that it was correct to say they had the right to use steam.

As I have said, Stirling, J., gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established.

It is not unworthy of note that in his report to the Board of Trade General Hutchinson, who was obviously aware of the provisions of the special Act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says: "The Act of 1882 gives the company authority to use mechanical power over all their system."

I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test, with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true.

Adopting the language of Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. D. p. 67, I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate

and not altogether free from imputation of carelessness, was a fair, honest, and *bonâ fide* statement on the part of the defendants, and by no means exposes them to an action for deceit."

I think the judgment of the Court of Appeal should be reversed.

*Order of the Court of Appeal reversed; order of Stirling, J., restored.*¹

CABOT v. CHRISTIE.

1869. 42 *Vermont*, 121.²

CASE for false warranty in the sale of a farm. Plea, not guilty. Trial by jury, May term, 1868, Barrett, J. presiding.

The plaintiff gave evidence tending to show that he bought the farm at the time and for the price stated in the declaration, and that the defendant made representations in respect to the number of acres, as of his own knowledge, designedly intending to induce the plaintiff to suppose and believe, and thereby the plaintiff was induced to and did suppose and believe, that the farm contained at least one hundred and thirty acres of land, and relying thereupon, the plaintiff made the purchase; that the defendant knew that there was not one hundred and thirty acres, or he didn't know that there was that quantity; that in fact there was only one hundred and seventeen acres and a few rods in the farm; that the plaintiff had no knowledge of the quantity except from the defendant's representation.

The defendant gave evidence tending to show that he supposed there was one hundred and thirty acres and a little more in the farm, derived from what he had heard said, and from various deeds in his possession of various grantors and of various parcels, but that he did not know, and did not profess or represent to the plaintiff that he knew how many acres there were in fact; that he gave the plaintiff all the information and sources of information he had on the subject, neither making any false representation, nor fraudulent concealment, nor any undertaking as to the number of acres in the farm. There was no evidence or claim that the farm was sold by the acre; but it appeared that it was sold in lump, or as a farm entire.

The plaintiff requested the court to charge the jury:—

First, That under the declaration the plaintiff is entitled to recover if he proves a warranty of the number of acres in the farm, or if he proves a fraudulent representation of the number of acres.

¹ By "The Directors' Liability Act" of Aug. 18, 1890, 53 & 54 Victoria, Chap. 64, directors and others issuing prospectuses are made liable, in certain cases, to compensate persons sustaining loss by reason of any untrue statement in the prospectus, unless it is proved that the parties issuing the prospectus had reasonable ground to believe, and did believe, that the statement was true. — ED.

² Arguments omitted. — ED.

Second, That the fraudulent representation may be proved either by evidence of false representations, known to the defendant to be false, and relied upon by the plaintiff, or by proof of an absolute representation of the number of acres, which representation was made with intent that the plaintiff should rely upon it, and was made upon professed knowledge, but without actual knowledge, and which was in fact false, but was relied upon by the plaintiff as true.

The Court complied with said requests only so far as is shown by the charge, and charged as follows : —

In order to entitle the plaintiff to recover he must satisfy the jury that the defendant knew the farm did not contain one hundred and thirty acres, or that he did not believe it contained one hundred and thirty acres ; and that in order to induce the plaintiff to buy the farm he falsely represented it to contain one hundred and thirty acres ; and that the plaintiff was by such false representation induced to make the purchase, believing it to contain that quantity.

If he honestly believed it contained one hundred and thirty acres, the plaintiff cannot recover, though the defendant was in error about it. Honest mistake is not fraud. Incorrect is not the same as false. You must find that he represented the quantity different from what he knew or believed to be true, with the fraudulent intent. Also, that the plaintiff was thus induced to make the purchase. That is, that the plaintiff would not have made the purchase if the defendant had not represented it to be one hundred and thirty acres. Inquire as to these several points. Fraud is not presumed, but must be proved.

The jury returned a verdict for the defendant. The plaintiff excepted to the charge in the respects in which it failed to comply with, or was against said requests. In other respects the charge was satisfactory.

The declaration counted both upon a false warranty of the defendant in regard to the number of acres contained in the farm, and a warranty in regard to said quantity.

Norman Paul and Washburn & Marsh, for plaintiff.

W. C. French, for defendant.

The opinion of the Court was delivered by

STEELE, J. 1. The plaintiff cannot recover upon the ground of a parol warranty of the quantity of the land. If the quantity was warranted it should be provable by the deed. It is true that a deed of conveyance need not contain all the stipulations of the parties. For example, the agreements as to consideration and mode of payment need not be embraced in the deed, for the instrument purports to be the deed of but one of the parties. But it does purport to contain the covenants of the grantor with respect to the property conveyed. To add a new covenant by parol proof would be a palpable violation of the familiar rule that written contracts are not to be varied by oral testimony. Such a parol stipulation, it has been held, could not be proved in respect to an ordinary bill of sale of personal property.

Nor is the plaintiff entitled to recover in this action upon the ground

of mistake. A mutual and material mistake, by which the purchaser was misled as to the quantity of land, would be a more appropriate ground for relief in a court of chancery than in a court of law.

If, then, the plaintiff was entitled to recover at all in this case, it was by reason of some fraud on the part of the defendant by which the bargain was induced.

2. The plaintiff complains of the ruling of the County Court upon the subject of fraud. It is conceded that the quantity of land was represented incorrectly. The Court properly told the jury that this, in itself, would not amount to fraud. To entitle the plaintiff to a recovery upon that ground, the defendant must have made some representation upon the subject that he did not believe to be true. The plaintiff claims, and his evidence tended to prove, that the defendant did make such a representation by stating the quantity of land as a matter within his own knowledge, when, in fact, as the defendant concedes, it was a matter upon which he had only a belief. We think it very clear that a party may be guilty of fraud by stating his belief as knowledge. Upon a statement of the defendant's mere belief, judgment, or information, the plaintiff might have regarded it prudent to procure a measurement of the land before completing his purchase. A statement, as of knowledge, if believed, would make a survey or measurement seem unnecessary. A representation of a fact, as of the party's own knowledge, if it prove false, is, unless explained, inferred to be wilfully false and made with an intent to deceive, at least in respect to the knowledge which is professed. A sufficient explanation however sometimes arises from the nature of the subject itself, or from the situation of the parties being such that the statement of knowledge could only be understood as an expression of strong belief or opinion. But the quantity of land in a farm is a matter upon which accurate or approximately accurate knowledge is not at all impossible or unusual. If the defendant had only a belief or opinion as to the quantity of land, it was an imposition upon the plaintiff to pass off such belief as knowledge. So, too, if he made an absolute representation as to the quantity, which was understood and intended to be understood as a statement upon knowledge, it is precisely the same as if he had distinctly and in terms professed to have knowledge as to the fact. It is often said that a representation is not fraudulent if the party who makes it believes it to be true. But a party who is aware that he has only an opinion how a fact is, and represents that opinion as knowledge, does not believe his representation to be true. As is well said in a note to the report of the case of *Taylor v. Ashton*, 11 Mees. & Wels. 418, (Phila. Ed.), the belief of a party to be an excuse for a false representation must be "a belief in the representation as made. The *scienter* will therefore be sufficiently established by showing that the assertion was made as of the defendant's own knowledge, and not as mere matter of opinion, with regard to facts of which he was aware that he had no such knowledge." The same principle of law has been repeatedly recognized. *Hammatt*

v. *Emerson*, 27 Maine, 308, 326; *Bennett v. Judson*, 21 N. Y. 238; *Stone v. Denny*, 4 Met. 151; *Hazard v. Irwin*, 18 Pick. 95.

In the case before us the plaintiff, under the charge of the Court, was denied the benefit of this rule of law, although there was evidence tending to show every necessary element of a fraud of the nature we have been considering. The plaintiff's request was refused, and the jury were instructed that the plaintiff could only recover in case they found "that the defendant represented the quantity of land different from what he knew or believed to be true." Under these instructions it would be immaterial whether he made the representation as a matter of knowledge or as a matter of opinion so long as he kept within his belief as to the quantity of land. In this we think there was error. The Court properly instructed the jury that the representation, to warrant a recovery, must have been relied on and have been an inducement to the purchase. The subsequent remark that the jury, to hold the defendant, must find that the plaintiff would not have made the purchase but for the representation, we regard as probably inadvertent.

What the plaintiff would have done but for the false representation is often a mere speculative inquiry, and is not the test of the plaintiff's right. If the false representations were material and relied upon, and were intended to operate and did operate as one of the inducements to the trade, it is not necessary to inquire whether the plaintiff would or would not have made the purchase without this inducement.

The judgment of the County Court is reversed and the cause is remanded.

HAYCRAFT v. CREASY.

1801. 2 *East*, 92.¹

ACTION on the case for making false representations as to the credit of one E. F. Robertson. The declaration alleged that the representations were false, and made with intent to injure plaintiff; but did not allege that the defendant knew them to be false.

At the trial before Lord Kenyon, C. J., at the sittings at Guildhall, the transaction which led to the representations in question appeared in substance to be this: A Miss Robertson (the person named in the declaration), who had formerly been a teacher at a school, in which capacity the defendant had first become acquainted with her, having had children at that school, on a sudden, some little time before the transaction happened, gave herself out to the world as a person of considerable fortune, which had devolved upon her by her mother's death, and with still greater expectations from her grandfather and

¹ Statement abridged. Arguments omitted. — Ed.

other relatives. Upon the strength of these assurances she contrived to obtain credit to a considerable amount from a number of persons, and settled herself in a large house at Blackheath, fitted up in an expensive manner, kept a carriage, exhibited a great show of plate, and other marks of affluence, talked of her relationship to persons of note; by means of all which she imposed on great numbers of persons, who believed her to be the character she had assumed, and visited her as such. Amongst other things she pretended to be the owner of a considerable estate in Scotland, from the rents of which she had been kept out for about forty years, but had then lately got into possession; and in support of these pretensions she exhibited supposed plans of the estate, with admeasurements of the woods, &c., and actually appointed a respectable man of business as her agent or steward, to receive the rents, &c., from whom she took bond to a large amount, as security for the faithful discharge of his functions. All these and other like appearances were proved to have been continually exhibited to the eyes of the defendant, who was a currier at Greenwich, near which Miss Robertson lived. And though some attempt was made by evidence to implicate him in the fraud that was going on, yet upon the result nothing of that sort was established against him; but it appeared that he himself had been duped by these appearances, and had actually lent her his acceptances to the amount of above £2000 upon the strength of them, for which he had not taken any security at the time the representations were made; though some months after, and before the final exposure of the imposition and the absconding of Miss Robertson, he had obtained of her a bond and warrant of attorney to secure his advances. The particular circumstances which led to the present action were these: About May or June, while Miss Robertson was fitting up her house at Blackheath, application was made on her behalf by the defendant to the plaintiff's son (who conducted the iron-mongery business in his father's absence), the defendant stating that he had recommended Miss Robertson to come to the plaintiff for such articles as she might want in the way of his business. The plaintiff's son inquired as to her responsibility, she being an entire stranger to him and his father; to which the defendant answered, "your father may credit her with perfect safety; for I know of my own knowledge that she has been left a considerable fortune lately by her mother, and that she is in daily expectation of a much greater at the death of her grandfather, who has been bedridden a considerable time." The defendant afterwards came with Miss Robertson and her companion (also known to the defendant for many years before as the keeper of the same school), and they looked out and ordered articles to a large amount. The plaintiff's son swore at the trial that he dealt with them entirely on the defendant's information. Finding the order, however, to be so large, the son again asked the defendant if he were certain as to the representation he had made; who again answered with the same certainty, and never expressed any doubt. The son thereupon wrote

to the plaintiff, and in consequence of the answer he received, applied to his uncle to see the defendant on the business. Upon this latter's application to the defendant for the same purpose, the defendant repeated his assertion that Miss Robertson was a person of great fortune and greater expectations, and was related to certain persons of rank whom he named; and added, "I can positively assure you of my own knowledge, that you may credit Miss Robertson to any amount with perfect safety." Various other assertions to the like effect were proved; but particularly on one occasion, after representations of this sort had been made to the plaintiff's brother, the latter said to the defendant, "I hope you do not inform this upon bare hearsay; but do you know the fact yourself?" The defendant answered, "Friend Haycraft, I know that your brother may trust Miss Robertson with perfect safety, to any amount." The jury found a verdict for the plaintiff for £485.

A rule was obtained, calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial had, on the ground that there was no fraud or deceit in the defendant making the representation in question, though he had incautiously averred that to be within his own knowledge, which in strictness he could not be said to know, but only had reasonable and probable cause to believe, and did in fact believe to be true at the time; and that without fraud the action was not maintainable though the representation turned out to be false.

Erskine, Garrow, Gibbs, and Lawes, showed cause against the rule.

The Attorney-General, Dallas, Marryatt, and Comyn, contra.

LORD KENYON, C. J. If there be any doubt in this case, I should wish to have it put in such a shape as to be carried to the *dernier resort*. But not knowing how that can be done, I shall deliver the opinion which at present I entertain upon the case. Here is a tradesman who has suffered a loss to a large amount in consequence of his having been induced to give credit to a third person; and by this action he calls on the defendant through whose misrepresentation the loss was incurred to make it good. The plaintiff's son, knowing nothing at the time of Miss Robertson, who had been recommended to the plaintiff by the defendant to buy goods of him in the way of his trade, makes the most particular inquiries concerning her credit, to all which the defendant answers on several occasions in the most positive terms, that she was a trustworthy person to his own knowledge. The plaintiff's brother, not satisfied with this, puts the question expressly to the defendant, whether he stated this upon hearsay or of his own knowledge, drawing his attention therefore to the subject in the most particular manner; to which the defendant again replies, "I can positively assure you of my own knowledge that you may credit Miss Robertson to any amount with perfect safety." The question then is, Whether that representation were true or false? No doubt it was a gross falsity. She was not a person to be credited with safety, nor had he any knowledge that she

was so ; and it is a juggle to say that the words in common parlance do not import knowledge in the strict sense of it. They were so understood between the parties at the time, and the plaintiff has suffered a loss in consequence of it. Soon after I came into this Court the case of *Pasley v. Freeman* occurred. I had the assistance of three very able judges to help me to form my judgment ; two of whom had long sat on the bench, and were peculiarly conversant with the forms of actions, and they were decidedly of opinion that the action lay ; though we had the misfortune to differ from the other judge, with whom I have now the honor to sit on the bench. I indeed was not then so well versed in the critical form of actions ; but I had endeavored to store my mind with established principles ; and I had learned that laws were never so well directed as when they were made to enforce religious, moral, and social duties between man and man ; and I knew that it was repugnant to all such duties for one man to make false representations to another to induce him to take measures which were injurious to him. That case has been acted upon ever since, and has recently been recognized by another decision of this Court, in which the two judges who have since taken their seats on the bench concurred. I am not able to distinguish this case from those upon principle. The question has nothing to do with the statute of frauds. That was meant to guard against certain legal presumptions of fraud arising out of contracts, but not to indemnify persons against tortious acts and misrepresentations whereby others are deceived and injured. For a series of years since *Pasley v. Freeman*, cases of this sort have occurred which have passed without dispute. And I have been led to depend on that decision acquiesced in so long, and as I conceived no longer disputed by the learned judge who differed at first from the rest of the Court. It is said that I imputed no fraud to this defendant at the trial. It is true that I used no hard words, because the case did not call for them. It was enough to state that the case rested on this, that the defendant affirmed that to be true within his own knowledge which he did not know to be true. This is fraudulent ; not perhaps in that sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of legal fraud, such as is presumed in all the cases within the statute of frauds. The fraud consists not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know. There are, it is true, some duties of imperfect obligation, as they are called, the breach or neglect of which will not subject a party to an action. If I know that one in whose welfare I am interested is about to marry a person of infamous character, or to enter into commercial dealings with an insolvent, it is my duty to warn him ; but no action lies if I omit it ; but if any one become an actor in deceiving another, if he lead him by any misrepresentations to do acts which are injurious to him, I learn from all religious, moral, and social duties, that such an action will lie against him

to answer in damages for his acts. And when I am called to point out legal authorities for this opinion, I say that this case stands on the same grounds of law and justice as the others which have been decided in this Court on the same subject. His lordship afterwards added that as to the want of criminal intention in the party making the false representation, he had learned from Lord Bacon's maxims that there was a distinction in that respect between answering *civiliter et criminaliter* for acts injurious to others; in the latter case the maxim applied, *actus non facit reum nisi mens sit rea*; but it was otherwise in civil actions, where the intent was immaterial if the act done were injurious to another.

GROSE, J. I do not understand the question to be whether this kind of action be maintainable: on that subject, although I still profess myself unable to comprehend the ground on which the case of *Pasley v. Freeman* was decided, yet I hold myself bound by the authority of it, so long as it remains unimpeached by any contrary decision. But I take the question here to be: Whether the evidence prove that which is necessary to sustain the action which, so far as I understood the arguments and opinion of the Court in *Pasley v. Freeman*, was said to be founded in fraud? It was there expressly declared in so many words, that fraud or deceit was the foundation of the action. The only question then is: Whether there were such evidence of fraud in this case as will sustain the action? Now I know not where to find any fraud in the transaction between these parties. I consider what was said by the defendant upon the several occasions, as no more than asserting his opinion on the credit of Miss Robertson; an opinion which he seems to have fairly entertained. It is true, that he asserted his own knowledge upon the subject; but consider what the subject-matter was of which that knowledge was predicated: it was concerning the credit of another, which is a matter of opinion. When he used those words, therefore, it is plain that he only meant to convey his strong belief of her credit, founded upon the means he had had of forming such an opinion and belief. There is no reason for us to suppose that at the time of making those declarations he meant to tell a lie and mislead the plaintiff. He himself had trusted her before to a considerable amount. He had no reason to know otherwise than what he expressed; and had on the contrary reasonable grounds for asserting knowledge in the sense I understand him to have used it. He had for some time before seen many other persons treat Miss Robertson as a person of fortune. He himself saw her living in affluence. He had seen plans of her supposed estate in Scotland, and had observed other circumstances, altogether well calculated to delude him. I cannot say that I should not also have been duped by the same appearances. Then it is also a circumstance in the case, that he does not appear to have had any interest in misrepresenting the matter to the plaintiff otherwise than as it really appeared to him. And taking the whole together, I think the evidence goes no further than his asserting that,

to his firm belief and conviction she was deserving of credit; and that the defendant was himself a dupe to appearances. But until some case shall be decided which goes further than that of *Pasley v. Freeman*, there must be evidence of fraud to support such an action; and evidence of being a dupe is not sufficient. Therefore, without meddling with the law as laid down in that case, but taking it at present to be right until it is overturned, I cannot concur in this verdict, there being no evidence of fraud as required by that determination.

LAWRENCE, J. Considering the great extent of this question, I wish that it may be put upon the record, in order that it may be submitted to the judgment of a higher Court. I have always understood the doctrine laid down in *Pasley v. Freeman* to be, that without fraud there was no cause of action. I collect that from the opinion delivered by each of the judges who concurred in that judgment. If this case had gone to the jury on the ground of fraud, I cannot say there would have been no evidence to support the verdict; but the case went to them on the ground that though the defendant were himself a dupe, yet if the representation made by him were false, he was answerable. Then the question is: Whether if a person assert that he knows such an one to be a person of fortune, and the fact be otherwise, although the party making the assertion believed it to be true, an action will lie to recover damages for an injury sustained in consequence of such misrepresentation? It does not appear that any of the judges went this length in *Pasley v. Freeman*. Stress has been laid on the defendant's assertion of his own knowledge of the matter; but persons in general are in the habit of speaking in this manner without understanding "knowledge" in the strict sense of the word in which a lawyer would use it. This observation will not only apply to ordinary men in common conversation, but also to persons of the best information. If any man should say that he knows there is no city larger than London, it must be understood that he is speaking only from information and belief upon such a subject, and not from actual mensuration. The same must be understood when one is speaking of his knowledge of the credit of another. In order to support the action, the representation must be made *malò animo*. It is not necessary that the party should gain, or intend to gain, anything for himself by it; but if he make it with a malicious intention that another should be injured by it, he shall make compensation in damages. But there must be something more than misapprehension or mistake. However, in deference to the opinion from which I differ, I cannot but state this with doubt and distrust of my own opinion.

[LE BLANC, J., delivered an opinion concurring with GROSE and LAWRENCE, JJ.] *Rule absolute.*

SECTION IV.

Defendant's Intent that Plaintiff should act on the Representation.

FOSTER v. CHARLES.

1830. 7 Bingham, 105.¹

CASE for deceit; the declaration alleging that certain false representations were made by the defendant to the plaintiffs, merchants in London, in order to induce them to engage one Jacque as their agent at Manchester.

Plea, the general issue.

At the trial before Tindal, C. J., London sittings after Michaelmas term, it appeared that in November or December, 1824, the defendant, a soap manufacturer, called on the plaintiffs, wholesale tea dealers, with whom he was on terms of intimacy, and after asking them if they did business at Manchester, said " he had a young friend for whom he was anxious to procure a commission in the tea trade at Manchester; a nice young man, who had an excellent connection there, and would be a great acquisition to any person who wanted to do business there; the defendant being on such terms with the plaintiffs, he had offered it to them before he proposed it to Smith and Co., — a respectable house in the same line of business; that Smith and Co. would jump at the offer; that his friend was so excellent a young man, that he would rather trust him without security than most men with; that this young man had been doing business at Manchester for a London tea house, who could no longer execute his extensive orders; that he had an uncle at Manchester, a clergyman of the Scotch Church, who would afford him great facilities in the way of business, and knew all the Scotch travellers in the trade; that defendant would like him to sell soap for defendant and his partner, but feared his other connections would not allow him time."

The plaintiffs said they had an objection to giving commissions; but the very strong recommendation defendant had given of his friend would induce them to think of it.

Accordingly, in the beginning of 1825, the plaintiffs employed James Jacque, the defendant's young friend, to do business for them on commission at Manchester. But by the middle of 1827, after repeatedly sending incorrect statements of the amount of his receipts on their behalf, he contrived to be a defaulter to them to the extent of £900 and upwards, and to involve them in bad debts to a much greater amount.

He then took the benefit of the insolvent debtors' act.

¹ Part of the statement is an abridgment of the report in 6 Bingham, 396. — Ed.

Instead of having been employed in the Manchester commission tea trade in the year 1824, as the defendant had stated to the plaintiffs, it appeared that he had, at the recommendation of the defendant, been taken into partnership without any capital by Mr. R. C. Stewart, a warehouseman in London, in July, 1823; but great losses having been incurred in that concern, aggravated by a robbery to some amount, Mr. Stewart closed the concern and dissolved the partnership in October, 1824.

Jacque was then indebted to Stewart in the sum of £800, which he undertook by deed, dated November 13, 1824, to pay by instalments, in two, three, and four years; but nothing was ever paid.

All this was known to the defendant, who had acted throughout for Jacque, and had negotiated the terms of the dissolution of partnership.

Letters were also put in, written by the defendant to Jacque, after the exposure of the Manchester transactions, in which the defendant exhorted Jacque to write various falsehoods to the plaintiffs with a view to the exculpation of the defendant, and to conceal from the plaintiffs his knowledge of some of the transactions at Manchester.

When the defendant was first applied to on the subject by the plaintiffs, he expressed his regret that his house should have been the means of introducing an unworthy agent to the plaintiffs; but that as they had been instrumental in bringing the loss on the plaintiffs, he would see his partner on the subject, and see what could be done towards relieving them from it. No step of that kind having been taken, the present action was commenced.

Tindal, C. J., told the jury to consider whether the representation complained of by the plaintiffs had ever been made, and if made, whether it was false within the knowledge of the defendant; for unless it were false within his knowledge, the action did not lie.

The jury returned a verdict for the defendant, which was set aside by the Court. [6 Bingham, 396.]

Upon a new trial, Tindal, C. J., told the jury that if the defendant made representations concerning Jacque, the tendency of which was to occasion loss to the plaintiff, knowing such representations to be false, and intending thereby to benefit himself, he was guilty of fraud in the common acceptance of the term; if he made such representations, knowing them to be false, without proposing thereby any advantage to himself, but proposing, perhaps, to benefit a third person, he was guilty of fraud in the legal acceptance of the term, and responsible to the plaintiff for any injury resulting from such representations.

The jury thereupon found for the plaintiff, damages £800; but added: "We consider there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he has done constituted a fraud in the legal acceptance of the term."

Jones, Serjt., now contended that this amounted to a verdict for the defendant; and therefore moved that the verdict might be entered for him, instead of the plaintiff.

He urged, at some length, nearly the same arguments as he had advanced on a former occasion, and adverted to the same authorities (see 6 Bing. 402); contending that this action was substituted for the ancient writ of deceit; that the gist of the action was a fraudulent intent on the part of the defendant to injure the plaintiff by deceiving him; that a defendant was not responsible for the consequences of a statement, merely because he knew it to be false; he was not responsible for the consequences of a bare lie; in order to render him responsible, it ought to be shown that he intended to defraud the plaintiff of something by the deceit he had practised. That if a party were responsible for the consequences of a lie told without any intention to defraud the hearer of something, no line could be drawn, and parties might be called on to answer for those excusable untruths, which were sometimes told for the purpose of avoiding a greater mischief.

TINDAL, C. J. No sufficient ground has been laid to induce us to disturb the verdict which has been found for the plaintiff. The application arises on a misconception of what the jury have found. They first deliver a verdict for the plaintiff, with damages, and then add, that in point of fact they consider the defendant had no fraudulent intention, although he had been guilty of fraud in the legal acceptance of the term.

Their attention had been drawn by me to two classes of motives possible on the part of the defendant; first, a desire to benefit himself by making a statement which he knew to be false; secondly, a desire to benefit some third person; and I stated that, although there might be no intention on his part to obtain an advantage for himself, it would still be a fraud, for which he was responsible in law, if he made representations productive of loss to another, knowing such representations to be false.

The jury in finding that he had no intention to defraud mean only that he was not actuated by the baser motive of obtaining an advantage for himself, but that he was guilty of fraud in law by stating that which he knew to be false, and which was the cause of loss to the plaintiff.

The question, therefore, is, whether, if a party makes representations which he knows to be false, and occasions injury thereby, he is not liable for the consequences of his falsehood.

It would be most dangerous to hold that he is not.

The confusion seems to have arisen from not distinguishing between what is fraud in law and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad; the person who makes such representations is responsible for the consequences; and the verdict, therefore, in this case ought not to be disturbed.

PARK, J. I am of the same opinion. In what fell from this Court in the case of *Tapp v. Lee*, and upon the former decision of the present

case, the doctrine has been laid down most accurately. It would be unfair to take the expressions of the jury, without connecting them with what the Chief-Justice had just presented for their consideration. It is clear that the jury meant to draw the distinction between the sordid motive of personal advantage and the legal fraud which might be committed by a representation false within the knowledge of the speaker, although made without any view to his own advantage. For such a representation the defendant is responsible if mischief ensues, whatever may have been his motive; and as to its being necessary to prove the motive by which he was actuated: when the case was last before the Court, Tindal, C. J., said, "I am not aware of any authority for such a position, nor that it can be material what the motive was; the law will infer an improper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff."

Here the defendant said, "That his friend was so excellent a young man, that he would rather trust him without security than most men with;" when he knew the contrary to be the fact, he was guilty of a fraud in law in making such a representation; and fraud in law is sufficient to support this action.

GASELEE, J. When this verdict is taken in connection with the direction of the Chief-Justice, there is an end to all doubt as to the meaning of the jury, and the finding is a perfect finding. What the jury meant by actual fraud was a sordid regard to self-interest; but the legal fraud, which is sufficient to sustain the action, was complete when the intention to mislead was followed by actual injury.

BOSANQUET, J. There seems to me to be no reason for disturbing this verdict. In the course of the trial, it is probable that improper motives had been ascribed to the defendant. The Chief-Justice, therefore, stated to the jury, and stated correctly, that motives of that description in the defendant were not essential to the plaintiff's action. If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law. Coupling that with what the Chief-Justice addressed to the jury, their verdict only means that the defendant did not propose to benefit himself, perhaps intended to benefit another; but that what he said, intending to benefit another, was false within his own knowledge, injurious to the party who received the communication, and, consequently, a fraud in the legal acceptance of the term.

Rule refused.

POLHILL v. WALTER.

1832. 3 *Barnewall & Adolphus*, 114.¹

LORD TENTERDEN, C. J. In this case, in which the defendant obtained a verdict on the trial before me at the sittings after Hilary Term, a rule *nisi* was obtained to enter a verdict for the plaintiff, and cause was shown during the last term. The declaration contained two counts: the first stated, that a foreign bill of exchange was drawn on a person of the name of Hancorne, and that the defendant falsely, fraudulently, and deceitfully did represent and pretend that he was duly authorized to accept the bill by the procuration, and on behalf of Hancorne, and did falsely and fraudulently pretend to accept the same by the procuration of Hancorne. It then proceeded to allege several indorsements of the bill, and that the plaintiff, relying on the pretended acceptance, and believing that the defendant had authority from Hancorne to accept, received the bill from the last indorsee in discharge of a debt; that the bill was dishonored, and that the plaintiff brought an unsuccessful action against Hancorne. The second count contained a similar statement of the false representation by the defendant, and that he accepted the bill in writing under pretence of the procuration from Hancorne; and then proceeded to describe the indorsements to the plaintiff, and the dishonor of the bill, and alleged, that thereupon it became and was the duty of the defendant to pay the bill as the acceptor thereof, but that he had not done so.

On the trial it appeared, that when the bill was presented for acceptance by a person named Armfield, who was one of the payees of the bill, Hancorne was absent; and that the defendant, who lived in the same house with him, was induced to write on the bill an acceptance as by the procuration of Hancorne, Armfield assuring him that the bill was perfectly regular, and the defendant fully believing that the acceptance would be sanctioned, and the bill paid at maturity, by the drawee. It was afterwards passed into the plaintiff's hands, and being dishonored when due, an action was brought against Hancorne; the defendant was called as a witness on the trial of that action, and he negating any authority from Hancorne, the plaintiff was nonsuited. I left to the jury the question of deceit and fraud in the defendant, as a question of fact on the evidence, and the jury having negatived all fraud, the defendant had a verdict, liberty being reserved to the plaintiff to move to enter a verdict, if the Court should think the action maintainable notwithstanding that finding.

On the argument, two points were made by the plaintiff's counsel. It was contended, in the first place, that although the defendant was not guilty of any fraud or deceit, he might be made liable as acceptor

¹ Statement of facts, and arguments of counsel, omitted. — Ed.

of the bill; that the second count was applicable to that view of the case; and that, after rejecting the allegations of fraud and falsehood in that count, it contained a sufficient statement of a cause of action against him, as acceptor. But we are clearly of opinion that the defendant cannot be made responsible in that character. It is enough to say that no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honor, which the defendant certainly was not.

This distinguishes the present case from that of a pretended agent making a promissory note (referred to in Mr. Roscoe's Digest of the Law of Bills of Exchange, note 9, p. 47), or purchasing goods in the name of a supposed principal. And, indeed, it may well be doubted if the defendant, by writing this acceptance, entered into any contract or warranty at all, that he had authority to do so; and if he did, it would be an insuperable objection to an action as on a contract by this plaintiff, that at all events there was no contract with, or warranty to, him.

It was in the next place contended that the allegation of falsehood and fraud in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated to induce another to act on the faith of it, in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud; and for this position was cited the case of *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105, which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of *Corbet v. Brown*, 8 Bing. 33. The principle of these cases appears to us to be well founded, and to apply to the present.

It is true that there the representation was made immediately to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here, the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have intended, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result.

If, then, the defendant, when he wrote the acceptance, and thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.

It is of the greatest importance in all transactions that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified, and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an accepted bill, and it was only in consequence of the false statement of the defendant that he actually had authority to accept, that the bill gained its credit, and the plaintiff sustained a loss. For these reasons we are of opinion that the rule should be made absolute to enter a verdict for the plaintiff.

Rule absolute.

LANGRIDGE v. LEVY.

1837. 2 *Meeson & Welsby*, 519.¹

CASE. The declaration stated, that whereas one George Langridge, the father of the plaintiff, on the 1st of June, 1833, at the request of the defendant, bargained with him to buy of him a certain gun, to wit, for the use of himself and his sons, at and for a certain price, to wit, the sum of £24, and the defendant then, by falsely and fraudulently warranting the said gun to have been made by Nock, and to be a good, safe, and secure gun, then sold the said gun to the said George Langridge, for the use of himself and his sons, for the said sum of £24, then paid by the said George Langridge to the defendant for the same: whereas in truth and in fact the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the said gun, at the time of the said warranty and sale, was not made by Nock, nor was it a good, safe, and secure gun, but, on the contrary thereof, was made and constructed by a maker very inferior as a gun-maker to Nock, and was then and at all times a very bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound and of very inferior materials; of all which premises the defendant, at the time of the making of the said warranty, and of the said sale, had full knowledge and notice. And the plaintiff in fact says that he, knowing and confiding in the said warranty, did use and employ the said gun,

¹ Arguments omitted. — Ed.

which but for the said warranty he would not have done; and that afterwards, to wit, on the 10th December, 1835, the said gun being then in the hands and use of the plaintiff, by reason and wholly in consequence of the weak, dangerous, and insufficient and unworkmanlike manufacture, construction, and materials thereof, then and whilst the said gun was so in use by the plaintiff, burst and exploded, became shattered and went to pieces; whereby and by reason whereof the plaintiff was greatly cut, wounded, maimed, &c., and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost, and is for ever deprived of the use of his hand, &c.

Pleas, first, not guilty; secondly, that the defendant did not warrant the said gun to be made by Nock, and to be a good, safe, and secure gun, in manner and form, &c.; thirdly, that the gun was not a bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound, and of very inferior materials, as in the declaration alleged; fourthly, that the gun did not, by reason and wholly in consequence of the weak, dangerous, and insufficient and unworkmanlike manufacture, construction, and materials thereof, burst, &c., as in the declaration alleged:—on all which issues were joined.

At the trial before Alderson, B., at the Somersetshire Summer Assizes, 1836, it appeared that in June, 1833, the plaintiff's father saw in the shop of the defendant, a gun-maker in Bristol, a double-barrelled gun, to which was attached a ticket in these terms: "Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty George IV.; cost 60 guineas: only 25 guineas." He went into the shop and saw the defendant, and examined the gun. The defendant (according to Langridge's statement) said he would warrant the gun to have been made by Nock for King George IV., and that he could produce Nock's invoice. Langridge told the defendant he wanted the gun for the use of himself and his sons, and desired him to send it to his house at Knowle, about two miles from Bristol, that they might see it tried. On the next day, accordingly, the defendant sent the gun to Langridge's house by his shopman, who also on that occasion warranted it to be made by Nock, and charged and fired it off several times. Langridge ultimately bought it of him for £24, and paid the price down. Langridge the father and his three sons used the gun occasionally; and in the month of December following, the plaintiff, his second son, having taken the gun into a field near his father's house to shoot some birds, putting in an ordinary charge, on firing off the second barrel it exploded, and mutilated his left hand so severely as to render it necessary that it should be amputated. There was conflicting evidence as to the fact of the gun's being an insecure one, or of inferior workmanship. Mr. Nock, however, proved that it was not manufactured by him. The defendant also denied that any warranty had been given. The learned Judge left it to the jury to say, first, whether the defendant had warranted the gun to be made by Nock, and to be a safe and secure one; secondly, whether it was in fact unsafe or of inferior

materials or workmanship, and exploded in consequence of being so; and thirdly, whether the defendant warranted it to be a safe gun, knowing that it was not so. The jury found a general verdict for the plaintiff, damages £400.

In Michaelmas Term, *Erle* moved in pursuance of leave reserved by the learned Judge, and obtained a rule *nisi* for arresting the judgment, on the ground that no duty could result out of a mere private contract, the defendant being clothed with no official or professional character out of which a known duty could arise; and that the injury did not arise so immediately from the defendant's act as that it could form the subject of an action on the case by the plaintiff, between whom and the defendant there was no privity of contract.

Bompas, Serjt., and *Ball* showed cause.

Erle and *Butt*, *contra*.

Cur. adv. vult.

PARKE, B. In this case a motion was made to arrest the judgment, after a verdict for the plaintiff. [His Lordship stated the declaration and proceeded]: It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon that contract for the breach of it.

The question then is whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are of opinion that there is, and that the present action may be supported.

We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer: we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability, so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass, and who should be injured thereby. We do not feel it necessary to go to that length, and our judgment proceeds upon another ground. If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been simply delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff for the purpose of being so used by him, with an accompanying representation to him that he might safely so use it, and that representation had been false to the defendant's knowledge, and

the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley v. Freeman*, 3 T. R. 51; which principle is, that a mere naked falsehood is not enough to give a right of action: but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, for the purpose of being delivered to and then used by the plaintiff, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person also was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument be delivered in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant with a view that the plaintiff should use the instrument in a dangerous way, and unless the representation had been made the dangerous act would never have been done.

If this view of the law be correct there is no doubt but that the facts which upon this record must be taken to have been found by the jury bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father for the purpose of being used by the plaintiff by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true (for this is the meaning of the term confiding), used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less. The delivery of the gun to the father is not indeed averred, but it is stated that by the act of the defendant the property was transferred to the father in order that the son might use it; and we must intend that the plaintiff took the gun with the father's consent, either from his possession or the defendant's; for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appear.

We therefore think that as there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.

We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale,

to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased. *Rule discharged.*

Affirmed in Exchequer Chamber, 4 M. & W. 337.

BEDFORD v. BAGSHAW.

1859. 4 *Hurlstone & Norman*, 538.¹

CASE for deceit.

The defendant was a director in a mining company, and desired that the committee of the London Stock Exchange should appoint a settling day for the shares, and insert the company on the official list. By the rules of the Stock Exchange this cannot be done, unless the committee are satisfied by certificates that the subscription list is full, with the exception of such shares as may be reserved for special purposes, and that not less than two-thirds of the scrip have been paid upon. By procurement of the defendant and others, a letter was sent to the Stock Exchange, stating that 41,711 shares had been paid up; also a certificate from the bankers of the company, stating that over £40,000 stood to the company's credit on the bankers' books. In fact, not more than 7,000 shares were ever paid upon, and this was known to defendant. The greater part of the money at the bankers was paid in by the defendant and his associates to enable the bankers to give the above certificate. With the exception of £7,000, the whole of the money was withdrawn from the bankers within a few days after the certificate was given.

The plaintiff saw the shares of "The Lake Bathurst Australian Gold Mining Company, in 100,000 shares, of £1 each," quoted in the printed list of the Stock Exchange. He knew the rules of the Stock Exchange as to the admission of companies to the list. Finding the shares low in price, and knowing that a large portion of the capital must have been paid up to entitle them to be quoted in the list, he bought 200 shares for £100. He said he believed the scheme would not be a successful one, but having been informed by his brokers that two thirds of the capital must have been paid up, and relying on the quotation in the official list, he felt satisfied that there would be sufficient to pay the shareholders 15s. a share.

The shares turned out to be valueless.

The defendant's counsel objected that the representation, not being made by the defendant to the plaintiff himself, was not a ground of action. The jury, under the direction of Pollock, C. B., found a ver-

¹ Statement abridged.

dict for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

O'Malley obtained a rule *nisi* to enter a verdict for defendant.

Bovill, *Holl*, and *Tayler* showed cause. (1) First, it is said that the plaintiff is not entitled to recover, because the shares were not quoted in the official list in consequence of the representation shown to have been authorized by the defendant, but in consequence of further communications made by the brokers of the nature of which there was no evidence. But, unless the defendant had caused the false representations to be made, no settling day would have been appointed. There is no proof that the brokers were guilty of any fraud, and nothing of the kind can be presumed. (2) Many cases show that it is not necessary, in order to constitute a cause of action, that the false representation should have been made immediately to the party who acts upon it. It is enough if the false representation is made with the intent that the person to whom it is made shall make it public. *Polhill v. Walter*, 3 B. & Ad. 114 (E. C. L. R. vol. 23); *Levy v. Langridge*, 4 M. & W. 337, and *Gerhard v. Bates*, 2 E. & B. 476 (E. C. L. R. vol. 75), are instances of the application of that principle. In *Pilmore v. Hood*, 5 Bing. N. C. 97 (E. C. L. R. vol. 35), the defendant, being about to sell a public-house, falsely represented to B., who had agreed to purchase it, that the receipts were £180 a month. B. having to the knowledge of the defendant communicated this representation to the plaintiff, who became the purchaser instead of B., it was held that an action lay against the defendant at the suit of the plaintiff. That case closely resembles the present, because the defendant here by fraud induced the committee of the Stock Exchange to make public a representation which he knew to be false. *Scott v. Dixon*, Q. B. Hil. T. 1859, is an authority in favor of the plaintiff. [BRAMWELL, B. Another point is, that the shares bought by the plaintiff ought not to have been sold by the parties to whom they were issued, but I do not see how that is material.]

O'Malley, in support of the rule, *Scott v. Dixon*, *supra*, is distinguishable from the present case, because there the defendant put a written document into the hands of the brokers to be shown to the persons intending to become purchasers. Here the defendant did not intend that the particular information communicated to the committee of the Stock Exchange should be made public, and in fact it was never published to the plaintiff. [BRAMWELL, B. Suppose a lecturer falsely represented that a medical student had attended lectures, and upon such representation the student was examined and got his diploma, would an action lie by a person who afterwards employed him? POLLOCK, C. B. There it is made a condition that students shall not be examined without having attended lectures. The attendance is a *sine qua non*, but not a *causa causans*.]

MARTIN, B. I am of opinion that the rule must be discharged. I think that the case is concluded, so far as we are concerned, by the

proceedings in the Exchequer Chamber in the case of *Seymour v. Bagshaw*, 18 C. B. 903 (E. C. L. R. vol. 86).¹

BRAMWELL, B. I am of the same opinion. The judgment in the Exchequer Chamber in *Seymour v. Bagshaw* did not pass *sub silentio*. I consider myself concluded by it. I entirely approve of the case of *Scott v. Dixon*, but I think that this case is distinguishable from it. It would be a strong thing to hold that if a man makes a verbal untrue statement to any person, as, for instance, that the shares in a particular company are a valuable security, if that person buys and recommends his friends to buy, that he is to be liable to any one who buys on the faith of such representation. But it is not a bad rule that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequences may be. If the rule is wrong it must be questioned in a Court of Appeal.

POLLOCK, C. B. I also think that the rule must be discharged. There was evidence to go to the jury. The defendant acted fraudulently, and made representations to the committee of the Stock Exchange with a view to induce persons to believe the existence of a particular state of things as to these shares. All persons buying shares on the Stock Exchange must be considered as persons to whom it was contemplated that the representation would be made. I am not prepared to lay down, as a general rule, that if a person makes a false representation, every one to whom it is repeated, and who acts upon it, may sue him. But it is a different thing where a director of a company procures an artificial and false value to be given to the shares in the company which he professes to offer to the public. Generally, if a false and fraudulent statement is made with a view to deceive the party who is injured by it, that affords a ground of action. But I think that there must always be this evidence against the person to be charged, viz., that the plaintiff was one of the persons to whom he contemplated that the representation should be made, or a person whom the defendant ought to have been aware he was injuring or might injure. If a director of a company, one of the persons who puts the shares forth into the world, deliberately adopts a scheme of falsehood and fraud, the effect of which is that parties buy the shares in consequence of the falsehood, I should feel no difficulty in saying that in such case an action is maintainable.

*Rule discharged.*²

¹ This case was tried before Jervis, C. J., in Trinity Vacation, 1855, when a verdict was found for the plaintiff. A bill of exceptions was tendered, and the case afterwards came before the Exchequer Chamber, and ultimately, in June, 1858, the judgment was affirmed in the House of Lords without argument. [4 C. B. N. S. 873 (E. C. L. R. vol. 83).]

² In Clerk & Lindsell on Torts, 415, note *b*, the following observations are made in reference to *Bedford v. Bagshaw*: "This case was, indeed, disapproved by Lord Chelmsford in *Peck v. Gurney* (L. R. 6 H. L. p. 397), upon the ground that, it being the plaintiff's knowledge of the rules that led him to appropriate the representation to himself, it could not be taken to be made to any one who was ignorant of the rules,

PEEK v. GURNEY.

1873. *Law Reports, 6 House of Lords, 377.*¹

THIS was an appeal against a decree of the Master of the Rolls, by which the appellant's bill had been dismissed with costs. *Law Rep.* 13 Eq. 79.

The appellant, when the Overend & Gurney Company was ordered to be wound up, was the holder therein of two thousand shares, in respect of which he was placed on the list of contributories, and his liability to be so was confirmed by a decision of this House. *Law Rep.* 2 H. L. 325.

The history of the company has already been fully given in the previous reports of this case. The following brief summary of the facts is all that is now necessary to be stated.

The company was formed in July, 1865, and the prospectus then issued. The business was begun on the 1st of August, 1865. The appellant was not an original allottee, but purchased his shares in the market in the months of October and December of that year. On the 10th of May, 1866, the company stopped payment. On the 11th of June a resolution was passed to have a voluntary winding-up, and on the 22d of June the usual order for such winding-up, under supervision of the Court, was made. The appellant who had been by this House, in July, 1867, declared to be liable as a contributory, and had paid nearly £100,000 on his shares under this winding-up, filed his bill in March, 1868, against the then directors, and against the executors of Thomas Augustus Gibb, who had been a director at the time of issuing the prospectus, but had died in November, 1866. The bill alleged misrepresentation of facts and concealment of facts on the part of the directors in the prospectus they issued, by which the appellant had been induced to purchase shares and had been damnified, and he sought indemnity from the estates of the directors.

and therefore could not be taken to be made to the plaintiff. But, with submission, it was intended to be made to all members of the public, though as regards those who did not know the rules it would necessarily be ineffectual. In *Reg. v. Aspinwall* (2 Q. B. D. 48), where the defendants were indicted for conspiring to falsely represent to the committee of the Stock Exchange that the rules had been complied with, with a view of obtaining a quotation for their shares, and thereby inducing the public to buy such shares, the very same objection, namely, that the injury to the public was too remote, was taken, and overruled by the Court of Appeal; and after verdict for the Crown, an omission in the indictment to aver an intent to defraud prospective purchasers of shares was held immaterial, since 'the natural and probable effect of deceiving the committee in the mode alleged would be to injure and deceive purchasers' (*ibid.* p. 65). Lord Chelmsford's disapproval of *Bedford v. Bagshaw* was not, indeed, there referred to; but inasmuch as the majority of the Lords in *Peek v. Gurney* expressed no disapproval of *Bedford v. Bagshaw*, the principle of that decision must be considered to be re-established by the above case of *Reg. v. Aspinwall*." — Ed.

¹ Only so much of the report is given as relates to one point. The arguments are omitted. — Ed.

The Master of the Rolls had held that if he had been an original allottee, and had come in due time, he would have been entitled to such indemnity, but that he was debarred of his remedy on the grounds, first, that he was in no better position than the allottee from whom he had bought, and secondly, that he had come too late for relief. His bill was therefore dismissed with costs.¹ Against that dismissal this appeal was brought.

Mr. Kay, Q. C., and *Mr. Swanston*, Q. C. (*Mr. Joliffe* was with them), for the appellant.

The Solicitor-General (*Sir G. Jessel*), *Mr. Macnaghten*, *Mr. C. S. Medd*, *Mr. Roxburgh*, Q. C., *Mr. Lindley*, Q. C., *Mr. Graham Hastings*, *Mr. Fry*, Q. C., *Mr. Jackson*, Q. C., *Mr. Sayer*, *Mr. Fooks*, Q. C., *Mr. W. Fooks*, and *Sir R. Baggallay*, Q. C., appeared for various defendants.

[Opinions were delivered by Lords Chelmsford, Colonsay, and Cairns.]

LORD CAIRNS. [After discussing another point.] But now, having answered the first question as I am obliged to answer it, I come to the second question in the case, namely, How does the appellant connect himself with this statement? The prospectus was issued on the 12th or 13th of July, 1865, and a copy was received or was obtained by the appellant. It is not proved from whom he obtained it. The object of the prospectus on the face of it is clearly to invite the public to take shares in the new company. The prospectus is, as is usual in such cases, an invitation, and there is appended to it a form of application for shares, which was to be filled up, and upon which form the invitation was to be answered. It is a prospectus in this shape, addressed to the whole of the public, no doubt, and any one of the public might take up the prospectus and appropriate it in that way to himself by answering it upon the form upon which it is intended by the prospectus that it should be answered. The appellant, however, did not take up and did not appropriate the prospectus in this way. For reasons which it is unnecessary to inquire into he declined to take, or at all events he did not originally take any shares in the company. The allotment of shares began on the 24th of July; it appears to have been completed on the 28th of July; and it is stated that two or three times the number of shares to be had in the company were applied for. The allotment having been completed, the prospectus, as it seems to me, had done its work; it was exhausted. The share list was full; the directors had obtained from the company the money which they desired to obtain. The appellant subsequently, upon the 17th of October, several months afterwards, bought one thousand shares at a premium of something over £7, and again, still later, on the 6th of December, he bought one thousand other shares at a premium of something over £6. He bought

¹ The facts of the case and the arguments are so fully stated in the report in the court below, that it has been deemed only necessary here to give them in a very abridged form, the more so as the judgment related principally to the rights of a purchaser from an allottee.

them on the Stock Exchange, and he, of course, did not know in the first instance from whom he bought them. In point of fact, it appears that as to the greater part of them they were shares which had originally been allotted to one of the old partners, Samuel Gurney, by whom they were transferred to a nominee for himself, in whose name they were registered; they were then sold upon the market, and re-sold apparently several times, because the premium seems to have risen from a much smaller to a much larger sum, and ultimately they were sold, at the premium which I have stated, to the appellant, and were registered in his name.

Now, my Lords, I ask the question, How can the directors of a company be liable, after the full original allotment of shares, for all the subsequent dealings which may take place with regard to those shares upon the Stock Exchange? If the argument of the appellant is right, they must be liable *ad infinitum*, for I know no means of pointing out any time at which the liability would, in point of fact, cease. Not only so, but if the argument be right, they must be liable, no matter what the premium may be at which the shares may be sold. That premium may rise from time to time from circumstances altogether unconnected with the prospectus, and yet, if the argument be right, the appellant would be entitled to call upon the directors to indemnify him up to the highest point at which the shares may be sold, for all that he may expend in buying the shares. My Lords, I ask, is there any authority for this proposition? I am aware of none.

During the course of the argument I took the liberty of putting to the learned counsel for the appellant a case which I think was not answered, and to which, so far as I know, no answer can be given that would be favorable to the appellant. I put the case of a person having built a house and desiring to sell it. He comes to me and wishes me to purchase it; he describes it as a highly advantageous purchase, and makes statements of fact to me with regard to the house which are untrue and are misrepresentations; but I decline to purchase, and our overtures come to an end. He subsequently sells it to some other person, upon what terms I know not. That other person completes the purchase, and that other person, desiring to raise money on mortgage, applies to me to lend him money. I lend him money upon a mortgage of the house. The facts stated to me originally turn out to be untrue, and are so material as that the house, not being as represented, becomes comparatively worthless. I then apply to the original vendor, remind him of what he told me, and complain to him that my money lent upon mortgage has been lost, and I commence an action against him for damages to recover my loss. I ask, could such an action be maintained? I know of no authority for it, and I am of opinion that an action of that kind would not lie.

My Lords, I take the rule on this point to have been happily stated in some expressions of my noble and learned friend the late Lord Chancellor (Lord Hatherley), when he was Vice-Chancellor, in the case of

Barry v. Croskey, 2 J. & H. 117, 118-123, in passages which I will take the liberty of reading to your Lordships. The first occurs during the argument. Upon a reference to the case of *Levy v. Langridge*, 4 M. & W. 337, the Vice-Chancellor said: "I take the ground of that decision to have been, that the false representation was made by the defendant with a view that it should be acted upon by the son in the manner that occasioned the injury. Mr. Baron Parke says: 'There is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way.' The father, acting upon the faith of that representation, put the gun into the hands of his son, who fired it off, when it burst and injured him. Suppose a stranger, knowing nothing of what had passed between the father and the defendant, to have found the gun lying, for instance, at an inn. If a stranger so finding the gun had taken it up and fired it, and the gun had burst and injured him, would he have had his action against the defendant upon the ground that Nock's name appeared upon the gun, and the defendant had sold it with that name appearing upon it, and as a gun made by Nock." Again, in the course of the argument, the Vice-Chancellor, addressing Mr. Rolt, says: "Your argument would show that every person who in consequence of De Berenger's frauds upon the Stock Exchange was induced to purchase stock at an advanced price, in reliance upon the false rumor he had circulated that peace was concluded, was entitled to maintain an action against De Berenger for the increase of price. Would not such consequences be too remote to form ground for an action." Finally, in giving judgment, the Vice-Chancellor stated what he understood to be the principles applicable to such a case. First, that "every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified; secondly, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting, is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss." And thirdly, he continues: "But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss." And his Honor comments a second time on the case of *Levy v. Langridge*, *supra*, as consistent with that principle.

My Lords, upon the grounds which I have mentioned, and upon the principles laid down in the case of *Barry v. Croskey*, *supra*, which appear to me to be consistent with what is stated by all the authorities that might be referred to, I am of opinion that the appellant in this case

has entirely failed to connect himself with the representations made in the prospectus, of which in my opinion an original allottee might have complained, but of which the present appellant cannot, I think, complain. On these grounds, therefore, I agree to the motion of my noble and learned friend that this appeal ought to be dismissed.

Order appealed from affirmed.

HUNNEWELL v. DUXBURY.

1891. 154 *Massachusetts*, 286.

TORT, for fraudulent representations alleged to be made by the defendants as directors of the Electric Advertising Company. The defendants' answer contained a demurrer to the second count of the declaration, which was overruled in the Superior Court; and the defendants appealed to this Court. The case was then tried before Pitman, J., and, after a verdict for the plaintiff, the defendants alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in March, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges.

C. R. Darling & W. S. Slocum (*W. F. Slocum* with them), for the defendants.

F. McIntire (*J. Woodbury* with him), for the plaintiff.

BARKER, J. The action is tort for deceit, in inducing the plaintiff to take notes of a corporation by false and fraudulent representations, alleged to have been made to him by the defendants, that the capital stock of the corporation, amounting to \$150,000, had been paid in, and that patents for electrical advertising devices, of the value of \$149,650, had been transferred to it.

From the exceptions, it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts; that it filed with the commissioner of corporations a certificate containing the above statements, dated August 11, 1885, as required by the St. of 1884, c. 330, § 3,¹ signed by the defendants,

¹ The St. of 1884, c. 330, is an act concerning foreign corporations, except foreign insurance companies, having a usual place of business in this Commonwealth. Section 3 is as follows: "Every such company before transacting business in this Commonwealth shall file with said commissioner a copy of its charter or certificate of incorporation, and a statement of the amount of its capital stock, and the amount paid in thereon to its treasurer, and if any part of such payment has been made otherwise than in money the statement shall set forth the particulars thereof, and said statement shall be subscribed and sworn to by its president, treasurer, and by a majority of its directors or officers having the powers usually exercised by directors. All such companies now doing business in this Commonwealth shall file such copy and such statement on or before the first day of October next, provided such business is thereafter continued. Every officer of a corporation which fails to comply with the requirements of this act, and every agent of such corporation who transacts business

with a jurat stating that on that date they had severally made oath that the certificate was true, to the best of their knowledge and belief; that before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records; and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations.

The main question, which is raised both by the demurrer to the second count of the declaration and by the exceptions, is whether the plaintiff can maintain an action of deceit for alleged misstatements contained in the certificate. In the opinion of a majority of the Court this question should have been decided adversely to the plaintiff. The execution by the defendants of the certificate to enable the corporation to file it under the St. of 1884, c. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit.

To sustain such an action, misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.

This certificate was not communicated by the defendants, or by the corporation, to the public or to the plaintiff. It was filed with a State official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to transact business in the State.

The terms of the statute carry no implication of such a liability. Statutes requiring similar statements from domestic corporations have been in force here since 1829, and whenever it was intended to impose a liability for false statements contained in them, there has been an express provision to that effect; and a requisite of the liability has uniformly been that the person to be held signed knowing the statement to be false. St. 1829, c. 53, § 9; Rev. Sts. c. 38, § 28; Gen. Sts. c. 60, § 30; St. 1870, c. 224, § 38, cl. 5; Pub. Sts. c. 106, § 60, cl. 5. To hold that the St. of 1884, c. 330, § 3, imposes upon those officers of a foreign corporation who sign the certificate, which is a condition of its admission, the added liability of an action of deceit, is to read into the statute what it does not contain.

If such an action lies, it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In *Fogg v. Pew*, 10 Gray, 409, it is held that the misrepresentations

as such in this Commonwealth shall for such failure be liable to a fine not exceeding five hundred dollars; but such failure shall not affect the validity of any contract by or with such corporation. Every such company shall pay into the treasury ten dollars for filing the copy of its charter, and five dollars for filing the statement required by this section."

must have been intended and allowed by those making them to operate on the mind of the party induced, and have been suffered to influence him. In *Bradley v. Poole*, 98 Mass. 169, the representations proved and relied on were made personally by the defendant to the plaintiff, in the course of the negotiation for the shares the price of which the plaintiff sought to recover. *Felker v. Standard Yarn Co.*, 148 Mass. 226, was an action under the Pub. Sts. c. 106, § 60, to enforce a liability explicitly declared by the statute.

Nor do we find any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: 1. Those of officers, members, or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares. 2. Those of persons who, to obtain the listing of stocks or securities upon the Stock Exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers. *Bagshaw v. Seymour*, 32 L. T. 81; *Bedford v. Bagshaw*, 4 H. & N. 538; *Watson v. Earl of Charlemont*, 12 Q. B. 856; *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *Jarrett v. Kennedy*, 6 C. B. 319; *Campbell v. Fleming*, 1 A. & E. 40; *Peek v. Derry*, 37 Ch. D. 541, and 14 App. Cas. 337; *Angus v. Clifford* [1891], 2 Ch. 449. In these cases the representations were clearly addressed to the plaintiffs among others of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. *Morgan v. Skiddy*, 62 N. Y. 319; *Tervilliger v. Great Western Telegraph Co.*, 59 Ill. 249; *Paddock v. Fletcher*, 42 Vt. 389. The numerous cases cited in the note to *Pasley v. Freeman*, in 2 Smith's Lead. Cas. (9th Am. ed.) 1320, are of the same character.

In the case at bar, the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the State a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes. It is not such a representation, made by one to another with intent to deceive, as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him.

This view of the law disposes of the case, and makes it unnecessary to consider the other questions raised at the trial.

Demurrer and exceptions sustained.

SECTION V.

Plaintiff acting in Reliance on the Representation, and suffering Damage thereby.

NYE v. MERRIAM.

1862. 35 *Vermont*, 438.¹

CASE for fraud, in cheating in weighing a quantity of butter sold by plaintiff to defendant.

Plaintiff's evidence tended to prove that he sold defendant eleven tubs of butter at a specified price per pound; that the butter was delivered by plaintiff's father in plaintiff's absence; that defendant weighed the butter in presence of the father, and cheated in the weighing, marking a false weight on each tub and also on a slip of paper given to the father.

Plaintiff subsequently met the defendant at Lebanon, N. H., and called upon him to pay the balance due for the butter. In relation to what took place between the plaintiff and the defendant on this occasion, the plaintiff testified as follows:—

“The defendant felt bad because he could not pay me. I said if he could not pay me he must give me his note, as I had nothing to show. He asked how much it was. I told him I did not know, but supposed he could tell. He said he could not, that his papers were in his valise or trunk. I said I supposed it was about sixty dollars; he thought it was fifty-five or sixty dollars. I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented, and gave me his note for sixty dollars, and I came home. I had lost the paper that my father gave me, and did not know what the figures were. There was not a word said between us about fraud in the weight, and no allusion to it whatever.”

Defendant's evidence tended to prove (among other things) that the note was given to cover and settle not only for the balance due for the butter, but also for plaintiff's claim for being cheated by the defendant in the weight.

The Court charged the jury that if the plaintiff satisfied them that the defendant purposely cheated in weighing the butter, still, if the plaintiff's claim for such fraud was mutually settled and adjusted by the parties, and included in said note, it would be a defence to the action, but that if the note was given merely in settlement of the balance due to the plaintiff for his butter, at its reported weight by the defendant, and with no reference whatever to the plaintiff's having been

¹ Statement abridged. — ED.

cheated by the defendant in the weight, then the plaintiff's right of action for such fraud was not thereby barred, even though the note given was large enough to cover the whole of the butter received by the defendant at the contract price; that if the facts in reference to the settlement and giving of the note were just as stated by the plaintiff, they would not amount to a settlement of the fraud in the weight, if such existed.

Defendant excepted to the charge.

Verdict for plaintiff.

W. W. Grout and Benj. H. Steele, for defendant.

J. S. Sartle and T. P. Redfield, for plaintiff.

ALDIS, J. The jury have found that the defendant attempted to cheat the plaintiff in the weight of his butter; that he reported the weight to the plaintiff's father, and marked the tubs at from twenty to thirty pounds less than the true weight. The plaintiff was not present when the butter was weighed, and therefore had to rely on the paper the defendant gave his father containing the figures of the weight.

I. If the plaintiff settled with the defendant for the butter upon the basis of the weight as reported by the defendant, and afterwards discovered the fraud, he would, it is admitted, be entitled to recover for the fraud.

II. But the defendant claims that the case, standing on the plaintiff's testimony, shows that the plaintiff has suffered no damage; that although the defendant may have attempted a fraud, yet in fact he has not accomplished his attempt; but on the contrary, has given his note to the plaintiff on settlement for more than the value of the butter at its true weight and contract price.

To sustain this action there must be both fraud and damage. A naked lie that causes no injury to another is not actionable. The lie must be relied upon, and must occasion damage.

The defendant claims, first, that the lie was not relied upon; and, secondly, that it did no damage, according to the plaintiff's own testimony; and that this view of the case was not presented to the jury. To determine this point we must consider the plaintiff's testimony, and the charge of the Court in regard to it.

The plaintiff, hearing that the defendant was about to go to California, and not to return to pay for the butter, went in search of him, and after going to New York and Boston, found the defendant at Lebanon, New Hampshire.

He called on the defendant for payment of the balance due for the butter. The defendant said he had no money. The plaintiff replied: "If you cannot pay me you must give me your note." "He, the defendant, asked how much it was. I told him I did not know, but supposed he could tell. He said that he could not, that his papers were in his valise. I said I supposed it was about sixty dollars. He thought it was fifty-five or sixty dollars."

It will be noticed that thus far nothing has been asked for by the plaintiff, or spoken of by either, but "payment of the balance due for

the butter ; " and that what that balance was, was what neither could exactly tell, — the plaintiff supposing it "about sixty dollars," and the defendant "fifty-five or sixty dollars." The plaintiff then proceeds : " I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented and gave me his note for sixty dollars." It is admitted that this note was large enough to cover the full amount of the butter at the contract price.

The plaintiff further said that he had lost the paper that his father gave him, and did not know what the figures were.

Now, upon this evidence it is clear that the defendant might justly have urged upon the jury, first, that the note was given solely for the balance due for the butter ; that the remark as to his trouble in hunting after the defendant was not intended by him, or understood by the defendant, as making those expenses or that trouble a part of the consideration of the note, but only as entitling him equitably or morally to have the defendant's doubt whether the balance was fifty-five or sixty dollars solved in the plaintiff's favor. If given solely for the balance due for the butter, and it covered the whole balance according to true weight and contract price, we are at a loss to see what damage occasioned by the original false statement of the defendant has accrued to the plaintiff. The plaintiff does not appear to have incurred any expense or trouble on account of the falsehood, or to have lost anything by it. He did not go in search of the defendant on account of it. The attempt to cheat was not consummated by payment or settlement at the lower weight.

Had he known all the facts as to the attempt to cheat, he could not have asked for more than the sixty dollars as the balance due him for the butter. Nor does it appear that the falsehood had worked him any injury for which he could have asked for further compensation.

Secondly, the defendant might also have justly insisted that to sustain this action the plaintiff must show that he relied upon the false statement in making the settlement.

The testimony of the plaintiff might fairly be claimed by the defendant as tending to show that the plaintiff could not recollect what the statement originally made by the defendant as to the weight was ; that the plaintiff had lost the paper which the defendant gave to his father, and had forgotten its contents ; that the defendant could not tell what the weight was, and did not renew or insist on the original falsehood ; and that both parties acted on their own knowledge and judgment as to the weight, uninfluenced by the false statement of the weight as originally made.

If the plaintiff did not recollect the false statement, — did not know and could not tell what the balance due for the butter was, according to the original falsehood, nor what the figures were which indicated the false weight, but claimed a balance sufficient to cover the whole and true weight, and received it on settlement, we are at a loss to see how he can claim to have been defrauded.

The Court in the charge did not present the case to the jury in these two aspects, but seemed to hold that the original falsehood necessarily included damage, and gave a right of action for fraud in weighing, and that, unless such right to sue was discharged in the settlement, it remained in full vigor, and that the plaintiff's testimony did not show it settled. For the reasons above given we think the charge erroneous, and that the judgment must be reversed.

[Omitting opinion on other points.]

Judgment reversed.

ENFIELD v. COLBURN.

1884. 63 *New Hampshire*, 218.

CASE. The declaration alleged that the defendant falsely and fraudulently made a claim upon the town for damages to his horse while travelling on a highway in said town, and falsely stated to the officers of the town that his horse had been injured through the insufficiency of the highway, and falsely swore to an affidavit stating the particulars of said injury, which he filed with the town-clerk of said town, "and said town, relying upon said false and fraudulent representations, so made by said defendant, incurred large expense in investigating the facts represented by said defendant, and found said representations to be false, and that said defendant's horse was not injured through the insufficiency of the highway in said town as said defendant well knew." The defendant demurred.

Spring & Spring, for the plaintiffs.

C. A. Dole, for the defendant.

CARPENTER, J. A mere naked lie — a falsehood — though told with intent to deceive, upon which nobody acts, and by which nobody is deceived, is not actionable. The declaration alleges, in substance, that the defendant falsely and fraudulently represented that he had a valid claim against the plaintiffs for damages, that the plaintiffs relied upon the representations, and that they investigated them at a large expense and found them to be false. One or the other of the last two allegations is as untruthful as the representations are claimed to be: both cannot be true. If the plaintiffs relied upon the representations, they did not investigate them; if they investigated them, they did not rely upon them. It is a perversion of language to say that they did both. The averments are incurably repugnant, and neither of them can be rejected as surplusage.

If the inquiry had resulted in favor of, instead of against, the validity of the defendant's claim, and if, relying upon the result of the examination and not upon the representations, the plaintiffs had paid the demand, they could maintain no action, however unfounded the claim and however false and fraudulent the defendant's representa-

tions might be. | He only who has trusted in and acted upon a falsehood to his injury can maintain an action. | It is upon this principle that no action lies for false representations of facts which are equally open to the observation and knowledge of both parties.

If this declaration can be sustained, a plaintiff who makes and institutes a suit upon a false and fraudulent claim, and is beaten, must not only satisfy the judgment against him for costs, but is also liable to an action on the case; and, generally, one may recover the cost of detecting and defeating any fraud which may be attempted upon him. There is no precedent for such an action. It is always at a party's option to act upon the faith of statements made to him, or upon his own judgment of the facts after making full inquiry. If, where he does the latter and makes a mistake, another is not answerable for his blunder, whatever pains he may have taken to lead him into it, still less should he be punished if by reason of the inquiry no mistake is committed. | It is the damages which result from acting upon false representations as if they were true, and not the expense of detecting their falsity, which a plaintiff is entitled to recover. |

Demurrer sustained.

TATTON v. WADE.

1856. 18 *Common Bench Reports*, 371.¹

ACTION on the case for a fraudulent misrepresentation of the credit and character of a third person, one Robert Case.

The cause was tried before Crowder, J., at the first sitting at Westminster in Easter Term last. The plaintiff, upon her examination, stated that Robert Case applied to and requested her to let on hire to him certain household furniture at a certain rent, Case stating to her at the time of such application that he was a clerk in the employ of an insurance company, at a salary of £100 a year, and £50 besides for other services, paid monthly; that she, the plaintiff, then required a reference from the said Robert Case, and that Case then referred her to the defendant; that she, the plaintiff, thereupon wrote and sent a letter to the defendant, which letter was then produced and given in evidence on the part of the plaintiff, and was in the words and figures following:—

“I am referred to you by Mr. Case, who has applied to me, in answer to my advertisement in the Times, respecting the hire of my furniture. I should have written before respecting Mr. Case, but thought it better to keep the matter open for a week, before applying to the referees. As a matter of course, it behooves me to be very cau-

¹ Statement abridged.—Ed.

tious ; and, perhaps, as you are related to Mr. Case, and doubtless feel interested about them, you would have no objection to become guarantee for the safety and regular payment (a quarter in advance) of the furniture. I shall feel obliged by a few lines in return, as I shall wait your answer before applying to other referees. Yours, &c.

“ E. WADE.”

And, that, in answer thereto, she, the plaintiff, received a letter written and sent to her by the defendant, which letter was then produced and given in evidence on the part of the plaintiff, and was in the words and figures following :—

“ 19th November, 1853.

“ I ought to apologize for not having answered your note sooner ; but illness prevented. I have known Mr. Case some years ; and, should you arrange with him to take the furniture, you need not be under any apprehension of his honesty : and he holds a very responsible situation ; therefore there is nothing to fear. As regards the security, I have mentioned that to him, and he objects to give personal security for furniture ; so that the matter must rest between you and Mr. Case.”

That, after receiving the last-mentioned letter, she, the plaintiff, had an interview with the said Robert Case, and told him that she wished to see his employers, and that the said Robert Case then objected thereto, saying that he had been so short a time in their employ that he should not wish so delicate a matter as hiring furniture to be named to them ; that she, the plaintiff, then said to him, “ You cannot expect me to rely on your word, and I must see some person who will assure me that your statement is correct, or I must decline ;” that, after the last-mentioned interview with the said Robert Case, she, the plaintiff, called upon and had an interview with the defendant, and that at such interview she, the plaintiff, took with her the letter which she had received from the defendant, and held it in her hand, and apologized to her for troubling her a second time, after receiving her note, and she, the plaintiff, said to the defendant, “ I am sorry to trouble you again about Mr. Case, but he objects to my seeing his employers, and, unless you assure me he is employed as he states, I must decline treating with him ;” and that thereupon the defendant then said to the plaintiff, “ You may depend upon it ;” and that she, the plaintiff, then said to the defendant, “ The amount of his salary is scarcely adequate to the expenses he is incurring ;” and that the defendant thereupon said to the plaintiff, “ He has engaged two clerks out of the office of the company at 30s. per week for board and lodging ;” and that the plaintiff then said to the defendant, “ It would have been more satisfactory if I had called upon his employers,” and that in answer thereto, the defendant then said to the plaintiff, “ It would be better for him to decline the furniture than that you should do so ;” and that the plain-

tiff then said to the defendant, "If you, as a respectable person, assure me his statement is correct, I shall close with him," and that, in answer thereto, the defendant then said to the plaintiff, "You may do so with perfect safety;" that, after the last-mentioned interview and conversation with the defendant, she, the plaintiff, let on hire and delivered the within-mentioned furniture to the said Robert Case as alleged in the declaration.

Upon her cross-examination, the plaintiff said that she was not quite satisfied with the answer, unless she could see the said Robert Case's employers, and so informed the said Robert Case at her aforesaid interview with him after she had received the said letter of the defendant, and before her aforesaid interview with the defendant, and that the said Robert Case, in answer thereto, then referred her to the defendant; that she then required of the said Robert Case that the defendant should satisfy her of the truth of his statement, and that she would not have gone on with the transaction without the defendant had assured her that the said Robert Case's statement was correct, and that she then said to the said Robert Case, "I must have an assurance from some person that your statement is correct, or I shall decline," and that he then said the defendant would do that; that her object in going to the defendant was, that the defendant might assure her that the statement of the said Robert Case was correct; that she relied on the statements aforesaid made by the defendant at the interview with the defendant; that it was the statements aforesaid made at this interview that induced her to trust the said Robert Case; that she should have refused him certainly, if the defendant had not made the statements aforesaid at that interview; and that it was the defendant's representations aforesaid at that interview that induced her to part with her furniture aforesaid.

Upon re-examination, the plaintiff stated that she relied on the defendant's said letter also, and that she would not have let the said Robert Case have the said furniture without that letter.

On the part of the defendant, it was insisted that the jury ought to find a verdict for the defendant, if they believed the evidence given by the plaintiff, and that she would not have parted with her furniture unless she had received the defendant's oral representations aforesaid, and required the learned judge so to direct the jury.

The learned judge, however, told the jury "that the result of the evidence was, that the plaintiff was induced partly by the letter of the defendant aforesaid, and partly by the oral representations of the defendant aforesaid, to part with her furniture aforesaid; but that, if they were of opinion, and believed, that the plaintiff was substantially and mainly induced by the letter of the defendant aforesaid to part with her furniture aforesaid, the plaintiff was entitled to their verdict."

The counsel for the defendant excepted to that ruling, and insisted that the jury ought to find a verdict for the defendant, if they believed the evidence given by the plaintiff, and that she would not have parted

with her furniture aforesaid unless she had received the defendant's oral representations aforesaid.

The jury having found for the plaintiff, the exceptions were now brought by writ of error to the Exchequer Chamber, and argued before POLLOCK, C. B., ALDERSON, B., COLERIDGE, J., WIGHTMAN, J., ERLE, J., CROMPTON, J., and BRAMWELL, B.

Kingdon, for the plaintiff in error. The 6th section 9 G. 4, c. 14, enacts that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith." The question to be raised upon this bill of exceptions is, whether, to bring a case within that statute, the *whole* representation or assurance must not be in writing, — whether it applies to a case in which part of the alleged misrepresentation was in writing and part oral. It appears that Case, who proposed to hire certain furniture of the plaintiff, had made a statement to the effect that he was a clerk in a certain office, receiving a certain amount of salary, referring to the defendant generally; and it is very material to observe, that the plaintiff's letter does not in terms ask for information, but for a guarantee. Now, the defendant's answer, declining to become security, merely states collaterally that she has known Case some years, that the plaintiff need be under no apprehension of his honesty, and that he held a responsible situation, and therefore there was nothing to fear. The plaintiff being dissatisfied still, an interview took place between her and the defendant, at which the former said, "Unless you assure me he (Case) is employed as he states, I must decline treating with him;" to which the defendant answered, "You may depend upon it." At this interview, the plaintiff again says to the defendant, "If you as a respectable person assure me his statement is correct, I shall close with him;" and the defendant in answer said, "You may do so with perfect safety." This shows that the plaintiff was not relying upon the written representation at all. [POLLOCK, C. B. All this might be very good argument in support of a motion for a new trial. It might be contended that the plaintiff did not mainly, or at all, rely upon the defendant's letter. But the question is, whether the learned judge was wrong in his direction to the jury.] It is impossible to deal with the ruling of the judge, without dealing with the evidence upon which it is founded. [POLLOCK, C. B. Do you mean to contend that the written representation is to be altogether disregarded, if anything false is added orally?] No. The learned judge states the result of the evidence to be, that the plaintiff was induced partly by the defendant's letter, and partly by her oral representations, to part with her furniture. [POLLOCK, C. B. The question is whether the proposition of the learned judge

was correct in point of law, — that, there being false representations¹ made both in writing and orally, if the jury thought that the plaintiff was substantially and mainly induced by the letter to part with her furniture, 'she was entitled to their verdict.] That the plaintiff acted mainly upon the oral representations, is perfectly manifest. [BRAMWELL, B. The substance of your argument is, that the damage complained of did not flow from the written statement.] Precisely so. It is submitted that the whole of the representation by which the plaintiff is induced to do that which leads to the damage, must be in writing. The whole statement need not be in writing; but the whole inducement for the plaintiff to do the thing which results in the cause of action. [BRAMWELL, B. In short, you say that the inducement to act must be the statement in writing, and nothing else. COLERIDGE, J. Suppose two persons subscribe a written character, might not the party who acts upon it, and sustains damage from its falsehood, have an action against one?] No doubt he might. [POLLOCK, C. B. Suppose the plaintiff had stated the substance of this direction in his declaration, would it have been bad on general demurrer?] If it showed that a material part of the inducement for the plaintiff to give credit did not comply with the statute, it is submitted that it would. [POLLOCK, C. B. It is difficult to see how the question could be left to the jury otherwise than by asking them whether they thought that the written representation substantially and mainly produced the injury. ALDERSON, B. Suppose an oral statement had been made, and the plaintiff, being in doubt, asks for a representation in writing, and, having got it, is still wavering, and ultimately is induced to act upon a further oral statement, would an action lie?] *In jure, non remota causa, sed proxima spectatur.* If regard is to be paid to the immediate cause operating upon the plaintiff's mind, it clearly was the oral representation. [WIGHTMAN, J. I should have thought there was no difficulty, if the word "mainly" had been left out. ALDERSON, B. And I, if the word "substantially" had been omitted. ERLE, J. Assuming that the plaintiff was influenced both by the written and the oral statement, and the oral statement was made last, I am of opinion that the defendant is liable. You never could ask a jury if they thought the letter *alone* induced the plaintiff to part with his goods. No man acts upon a single inducement. The appearance and demeanor of Case must have operated in some degree upon the plaintiff's mind. ALDERSON, B. Suppose the plaintiff had required two written statements (from different persons), and these were given at different times, the persons giving them would not be jointly liable. According to your argument, neither would be liable, though each is a *causa sine quâ non*. Is not the letter here *causa sine quâ non*?] In the case put, which, however, differs widely from this, there would

¹ It is worthy of remark, that there was nothing upon the face of the bill of exceptions to show that the statements vouched by the defendant were false, or that the plaintiff had sustained any damage.

be a cause of action complete against each. But that is not precisely this case. Where the same person makes two separate and distinct representations, one being in writing, the other not, and each operates upon the mind of the person to whom the representations are made, how are they to be separated? Formerly, these representations as to the character and credit of third persons were thought to be within the 4th section of the statute of frauds, 29 Car. 2, c. 3, until that was set right by the case of *Pasley v. Freeman*, 3 T. R. 51. In *Lyde v. Barnard*, 1 M. & W. 101, 114, Parke, B., says: "Since the case of *Pasley v. Freeman*, it is well known, from some reported cases, and from others which have not found their way into the books, that a practice had grown up of fixing a person with the debt of another, by parol evidence of a representation as to the solvency or trustworthiness of a third person, and proof that credit was given on the faith of that representation. The practice did not extend to all cases within the statute of frauds. That statute applies to a guarantee, for good consideration, for a debt already contracted, as well as where credit was to be given; but the evil existed only in those cases in which credit was subsequently given on the faith of the representation made. In this respect, the practice of bringing actions on such parol representations was an evasion of the statute of frauds; and Lord Tenterden (who framed the act), I think, meant to put all the cases on the same footing, where one, on the personal credit of another, gave personal credit to a third, and to make it necessary that there should be a note in writing where such credit was given on the faith of a representation, as well as where it was given on the faith of a positive promise. I consider, therefore, the mischief to be this, and no more." [POLLOCK, C. B. Lord Tenterden told me that his motive for introducing that provision into the bill was, that he was struck with the remarkable fact that, numerous as actions of the sort were, — actions for false representations as to the character and credit of third persons, — the plaintiff almost invariably succeeded; which induced him to think there was some latent injustice which required a remedy. That is the true history of that enactment.] Parke, B., and Alderson, B., in *Lyde v. Barnard*, treat the 6th section of the 9 G. 4, c. 14; as having brought back this species of action within the pale of the statute of frauds. Under that statute, it has been held that the promise is an entire thing, and if void in part for not being in writing it is void altogether, and cannot be made the subject of an action; per Lord Tenterden, in *Thomas v. Williams*, 10 B. & C. 664, 671 (E. C. L. R. vol. 21). So, by parity of reasoning, the representation, being entire, cannot be good as to part and void as to the rest. All the authorities upon this subject are collected in the notes to *Chandelor v. Lopus*, Cro. Jac. 2, in 1 Smith's Leading Cases, 4th ed. pp. 144–146, where the precise point now before the Court, viz. whether in a case depending partly but not wholly on such misrepresentations, parol evidence would be admissible, is said not yet to have been sol-

emly decided. To entitle the plaintiff to recover, she was bound to show that the damage complained of flowed from the representation set out in the declaration. If the false representations of two persons made at separate times could be said to have caused the damage, no doubt both might be sued. [POLLOCK, C. B. An action might be brought against any one who mainly and substantially contributed to the wrong. In the case put, either might be sued, but I apprehend the plaintiff could not recover damages against both]. It might be matter for the equitable jurisdiction of the Court. [BRAMWELL, B. If A. makes a false statement, upon which the plaintiff would not have acted, but for a subsequent false statement by B., A. would not be liable to an action. B. would be the *causa causans*. COLERIDGE, J. Suppose two persons on separate occasions speak defamatory words of me, which are actionable only by reason of special damage, and I sustain damage in consequence of the speaking of *all* the words, — may I not maintain an action against either of them?] If no damage would have resulted from the first speaking, but for the confirmation of the last speaker, the latter only, it is submitted, would be the person liable.

Hugh Hill, contra. If the ruling of the learned judge in this case be held to be wrong, a party taking a reference as to the character or credit of another must in future be content with one referee. To entitle a plaintiff to maintain an action of this sort, fraud and damage must concur. It is not disputed here that there was fraud. The question is, whether it is necessary that the fraud charged in the declaration should be found to have been the sole cause of the damage, or whether it is not enough if it substantially caused the damage, although something else might also have been contributory thereto. The declaration alleges that the defendant made a false and fraudulent representation as to the character and circumstances of Case, and that, in consequence of that false and fraudulent representation, the plaintiff parted with her goods. The evidence showed a representation in writing as alleged in the declaration, and also subsequent oral representations to the same effect; and the plaintiff proved that she would not have parted with her goods but for the written representation. The learned judge fairly stated the result of the evidence to be, that the plaintiff was induced partly by the defendant's letter, and partly by her oral representations, to let Case have the furniture; but that, if they believed that the plaintiff was substantially and mainly induced by the defendant's letter to part with her furniture, she was entitled to their verdict. It is difficult to see how otherwise the case could have been left. It is scarcely possible to conceive a case in which a party is influenced by one single simple motive. Relying substantially upon the defendant's written representation, is the plaintiff to lose her remedy because she may have been somewhat influenced by the subsequent oral representations of the defendant or the plausible appearance and manner of the party she was dealing with? Whether she really

was influenced by the one statement or the other, was matter for comment on the part of counsel to the jury. But, if the written representation was substantially the cause of the damage of which the plaintiff complains, it is properly the subject of an action. [ALDERSON, B. If the plaintiff sustained any damage from the written representation, the rest would be mere matter of computation for the jury]. Precisely so. A man asks for credit, referring to A. and B. A. writes an answer, stating that he knows him well, and that he is employed as secretary to a railway company, with a salary of £500 a year, which turns out to be false. The inquirer, not knowing A., pauses until he receives B.'s answer. B. writes, saying that he knew the party some years ago, and believed him to be then responsible and trustworthy, but that he knows nothing of his present circumstances. Upon this the required credit is given, and the result is, a loss to the creditor. Is A. the less liable for his false representation, because the credit would not have been given, but for the true representation subsequently made by B.? Or, would he be less liable, if B.'s statement also were false? The priority of the statements, or the degree of influence each may possibly have on the mind of the person to whom they are made, surely cannot be the criterion of liability.

After a short conference, *Hill* was informed that the Court did not desire to hear him further.

POLLOCK, C. B. I can very well understand the dissatisfaction felt by Mr. Kingdon at the result of the trial; and I can perfectly enter into the view which he takes, when, the plaintiff having almost admitted herself out of court by the answers which she had given on cross-examination, to the effect that it was the statements verbally made by the defendant that induced her to trust Case, and that she would certainly have refused to do so but for those representations, stated, on re-examination, that she relied on the defendant's letter also, and that she would not have let Case have the furniture without that letter. The learned judge then had before him the evidence of the plaintiff, first, generally stating the circumstances out of which the cause of action arose, then, on cross-examination, admitting that the defendant's oral representations induced her to trust Case, and then on re-examination averring that she would not have trusted Case but for the written statements, — the words probably being put into her mouth by the adroitness of counsel. It is not for us to say whether the jury have come to a right conclusion, or what their verdict ought to have been. But the question for us to consider simply is, whether or not the case was properly left to them. It is clear upon the evidence that the plaintiff in part may have relied on the oral and in part on the written representations. Then, the learned judge, inasmuch as the defendant would not be responsible for what passed by word of mouth, but would be for the statements contained in the letter, tells the jury that, if they believe that the plaintiff was substantially and mainly induced by the letter of the defendant to part with her furni-

ture, the plaintiff was entitled to their verdict. I am of opinion that that direction was perfectly free from objection. It may be that the jury ought to have come to a different conclusion; but the question is, was the direction right? I think it was perfectly right. I take it to be clear that, if a person does an act for which he is by law responsible, — and a person making a false representation in writing is responsible in law, — he is liable to be sued for the mischief he has occasioned; and it is no answer to say that something else in part contributed to it (not being the consequence of the conduct of the defendant himself). If the false representation in writing substantially contributed to the injury of which the plaintiff complains, the defendant is clearly responsible. I think our judgment ought to be for the plaintiff.

ALDERSON, B. I also think the question was entirely for the jury. The evidence shows that the plaintiff at least partly acted upon the written representation. For all the damage resulting from that representation, therefore, the defendant is clearly liable.

COLERIDGE, J. I am of the same opinion. In substance, exactly the right question was put to the jury. The 6th section of the statute, upon which the question turns, enacts that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith; it leaves everything else to the general principle of law. What is that general principle? Why, that there must, in order to sustain an action of this sort, be *damnum et injuria*. No doubt there was abundant evidence of *injuria* here; and it was for the jury to say whether or not the *injuria* produced the *damnum*. That is entirely a question for them. The defendant must pay damages wholly for the *injuria*.

WIGHTMAN, J. I am of the same opinion. The allegation in the declaration is, that the plaintiff was induced by the false and fraudulent representation of the defendant to give credit to Case, that is, by the representation which was proved by the writing. The plaintiff, in her evidence, says that the oral representations induced her to part with her furniture, but that she relied on the latter also, and would not have let Case have the furniture without that letter. The direction of the learned judge thereupon is, that the result of the evidence was, that the plaintiff was induced partly by the letter of the defendant, and partly by her oral representations, to part with her furniture; but that, if they believed that she was substantially and mainly induced so to do by the defendant's letter, the plaintiff was entitled to their verdict. I think that direction was quite correct. If the written representation was not a substantive cause of the injury, the jury should have found for the defendant; but if it was a substantial

inducement to the injury, it is no answer to say that other representations not in writing in some measure conduced to it also.

CROMPTON, J. I am of the same opinion. It is clear that the plaintiff has sustained a wrong at the hands of the defendant; and the only question is, whether the learned judge properly left the case to the jury. The way in which I understood him to have put it is, would the injury have happened without the letter? If it would not, it is no answer to say that something else also contributed to the injury of which the plaintiff complains.

BRAMWELL, B. The real question is — though I must confess I have entertained a little doubt, — whether there is a continuing contributory cause; whether the plaintiff acted upon the written representation. If there was, all concurs that is essential to the maintenance of the action. The jury should apportion the damages to that which is occasioned by the writing. What does the declaration charge? Not that the plaintiff was induced to intrust her furniture to Case *solely* in consequence of the defendant's letter. If so, there would be much weight in Mr. Kingdon's argument. That, however, is not the meaning of the declaration. But I think the proper way to deal with the declaration is to treat it as meaning that the defendant did that which was an inducing cause of the injury the plaintiff has sustained. The learned judge sums up almost in the very words of the declaration. He tells the jury that the result of the evidence is, that the plaintiff was induced partly by the letter and partly by the oral representations of the defendant to part with her furniture; but that, if they believed that the plaintiff was substantially and mainly induced by the letter to do as she did, she was entitled to their verdict. I concur with the rest of the Court in thinking that that direction was perfectly correct.

Judgment for the plaintiff.

MATTHEWS v. BLISS.

1839. 22 *Pickering*, 48.¹

ACTION on the case, alleging that plaintiff was part owner of a vessel; that he had given to one Chapin a power in writing, authorizing Chapin to sell plaintiff's share of the vessel for a fair price; and that defendants by false and fraudulent representations induced Chapin to sell and convey plaintiff's share for much less than its true value.

Plaintiff introduced evidence tending to prove the foregoing allegations.

¹ Only so much of the case is given as relates to one point. The arguments are omitted. — Ed.

The Court instructed the jury, that, in order to maintain this action, they must be satisfied that the defendants had made the false representation set forth in the declaration, and that the sale was effected by means of such representation; that it was not necessary that it should be the sole and only motive inducing the sale, but it must have been a predominant one.

Verdict for defendants.

H. H. Fuller, and F. Smith, for plaintiff.

Choate, Simmons, and Gay, for defendants.

SHAW, C. J. [Omitting part of opinion.] The judge further instructed the jury, that in order to maintain this action, they must be satisfied that the defendants had made the false representation, and that the sale was produced by means of it; that it was not necessary that it should be the sole and only motive inducing the sale, but it must have been a predominant one. In this particular, the Court are of opinion, that the direction, as it may have been and probably was understood by the jury, was not strictly correct; though it may have been so qualified and illustrated as to prevent the jury from being misled by it.

The term "predominant," in its natural and ordinary signification, is understood to be something greater or superior in power and influence to others, with which it is connected or compared. So understood, a predominant motive, when several motives may have operated, is one of greater force and effect, in producing the given result, than any other motive. But the Court are of opinion, that if the false and fraudulent representation was a motive at all, inducing to the act, if it was one of several motives, acting together, and by their combined force producing the result, it should have been left to the jury so to find it. If the false suggestion had no influence, if the plaintiff's agent would have done the same thing and made the sale if such representation had not been made, then it was not a motive to the act, and the plaintiff's agent was not induced to sell by means of it. On the whole, considering that the ordinary and natural meaning of the term "predominant," when applied to one among several motives, is such as has been stated, that the jury may have so understood it, and if they did so understand it, they may have come to a verdict not warranted by law, upon the evidence before them, the Court are of opinion, that the verdict ought to be set aside, and a new trial granted.

[Omitting remainder of opinion.]

New trial granted.

FREEMAN v. VENNER.

1876. 120 *Massachusetts*, 424.¹

ACTION of tort. Writ dated Dec. 22, 1873. Plaintiff held the negotiable promissory note of J. W. and J. H. Cox, dated July 16, 1873, payable to plaintiff or order in two years from date; and he also held a mortgage conditioned to secure the note. In consideration of land to be conveyed to him by the defendant, plaintiff agreed to assign to defendant the mortgage and note; but he did not agree to make an unrestricted indorsement of the note, and the defendant was not entitled to have the personal liability of the plaintiff as indorser of the note. Plaintiff, through ignorance of the law, and by reason of the false and fraudulent representations of defendant, on Dec. 1, 1873, indorsed the note in blank without any qualification. As soon as the plaintiff became aware of the obligation he had thus assumed, and before defendant had negotiated the note or altered his position in any way, plaintiff demanded to be allowed to qualify his indorsement so that it should merely transfer the title according to the agreement. Defendant refused to allow this. Thereupon plaintiff forbade defendant to negotiate the note; but defendant, notwithstanding, negotiated the note before maturity to one Tenney, a *bona fide* holder for value.

Upon a trial by a judge, without a jury, the foregoing facts were found, substantially as alleged in the declaration.

It also appeared, that, before commencing his action, or at any time before said trial, the plaintiff had made no payment on account or by reason of the indorsement; that, before the commencement of this action and before the maturity of the note, the makers thereof had become bankrupts; that since the commencement a semi-annual instalment of interest had become due; that Tenney had caused the real estate to be sold by virtue of the power contained in the mortgage, had applied a part of the proceeds of the sale in liquidation of that interest, and, since the maturity of the note, had applied the balance of the proceeds in part payment of the note, and had commenced an action against the plaintiff to recover the balance of said note (due demand having been made and notice given), which action is now pending.

Defendant requested the judge to rule that, upon the foregoing facts, the plaintiff could not maintain his action, but, if he could, that he was entitled to recover only nominal damages. The judge declined so to rule, and held that defendant was liable for the conversion of the note, and that the measure of the plaintiff's damages was the amount which the plaintiff was legally compellable to pay to

¹ Statement abridged. Part of opinion omitted. — Ed.

the holder of the note, namely, the face of the note and interest, less the amount realized from the sale under the mortgage, treating the same as a partial payment. Defendant excepted.

G. D. Robinson, for defendant.

I. D. Van Duzee, for plaintiff.

COLT, J. [After deciding that there was no conversion of the note.] The further objection is, that treating this as an action to recover damages for an alleged fraud, the plaintiff shows no damages sustained at the time his action was commenced. It was then uncertain and contingent whether he would ever be called on to pay the note. It was payable to the plaintiff or order in two years, and was dated in July, 1873, shortly before its transfer by his indorsement to the defendant. The liability of the plaintiff depended on the failure of the makers to pay and the giving of due notice to him as indorser. No payment has in fact ever been made by him. If the holder receives his pay from the makers through the mortgage security or otherwise, the plaintiff will have suffered no actionable wrong. There will have been no concurrence of damage with fraud, within the rule on which such actions are founded. And as there has been no invasion of the plaintiff's right, no breach of promise, and no interference with his property, there can be no recovery of even nominal damages in this action. *Pasley v. Freeman*, 3 T. R. 51; 2 Smith Lead. Cas. (6th Am. ed.) 157, and notes.

Exceptions sustained.

SECTION VI.

Whether Plaintiff is barred by failing to use the Means at his command to detect the Falsehood.

COTTRILL v. KRUM.

1890. 100 *Missouri*, 397.¹

APPEAL from St. Louis City Circuit Court. Hon A. M. Thayer, Judge.

C. H. Krum, for appellant.

John C. Orrick, for respondent.

BRACE, J. The plaintiff in this action seeks to recover damages for false representations alleged to have been made by the defendant in a trade in which the plaintiff, in exchange for fifty shares of paid up stock in the "Globe Panorama Company," sold and conveyed to the defendant a certain lot of ground in the city of St. Louis. The verdict was for the defendant, and from the judgment thereon in his favor the

¹ Arguments and part of opinion omitted. — ED.

plaintiff appeals. Many grounds are assigned in the motion for a new trial, but the only one urged here, why the Court should have granted a new trial, is the alleged error of the Court in giving the seventh instruction for the plaintiff [defendant?], which is as follows: "7. If you find from the evidence that plaintiff, by diligent inquiry, might have ascertained the truth or falsity of the alleged representation, and failed to make such investigation, then the Court instructs you, that he cannot recover in this action."

I. It is urged against this instruction that it is merely an abstract proposition of law, and does not define or explain to the jury what meaning the law gives to the expression "diligent inquiry," and is, therefore, erroneous; and, in support of this contention, we are cited to many cases in which instructions were held to be erroneous, because legal propositions and the meaning of technical legal phrases or words were therein submitted to the jury, *e. g.*, *Fugate v. Carter*, 5 Mo. 267, and *Anderson v. McPike*, 86 Mo. 293, in which the jury were called upon to determine what was "a material averment;" *Morgan v. Durfee*, 69 Mo. 469, to define "malice;" *Boogher v. Neece*, 75 Mo. 383, in which the question of what was "adverse possession" and "color of title" was left to the jury; *Wiser v. Chesley*, 53 Mo. 547, what was "gross negligence;" and *Atteberry v. Powell*, 29 Mo. 429, in which it was left to the jury to determine the meaning to be applied to the words "in substance" in an action of slander. In all these cases, it will be observed, either a question of law, or the meaning of certain words and terms to which a special and peculiar meaning had, by law, been applied, was left to the jury, and it was properly held that this was error. It is possible that cases might arise in which the words "diligent inquiry" might become the proper subject of judicial interpretation, but in this case it is evident they were used by the Court, and could have been understood by the jury, in no other than in their usual, ordinary, and conventional sense, and such sense is presumed to be as well comprehended by the jury as the Court, and needs no definition. It is not necessary that the meaning of ordinary words and phrases, used in their usual and conventional sense, should be explained in instructions.

II. It is further argued against said instruction that it asserts an incorrect legal proposition, and ignores the difference between the situations of the parties in regard to the property concerning which the representations are alleged to have been made. The facts upon which the Court in its first instruction to the jury authorized a finding for the plaintiff were "that, if at the time when the defendant traded to plaintiff the panorama stock in the petition described, defendant was, and from the opening of the enterprise had been, business manager of the Globe Panorama Company, and in charge of the business in St. Louis, and that, with a view to the trade of the stock aforesaid to the plaintiff, and as an inducement thereto, he stated to plaintiff, in substance, that the intrinsic and actual value of said panorama stock was

one hundred dollars per share, and that none of said stock had been sold or could be bought for less than par, or one hundred dollars per share, and if he further stated at the time and with the purpose aforesaid, that the actual cost price of the panorama property in St. Louis was seventy-five to eighty thousand dollars, and that from the opening of the business the company had been, and was still, doing a profitable business, and that from the time the business opened the company had been earning and paying a dividend of two per cent, or two dollars per share per month, and if you further find that said statements were untrue, that they were made for the purpose of deceiving and misleading plaintiff as to the true character or value of said stock, and if you find that plaintiff traded the Pine Street lot for said stock on the faith of said representations, and that he would not have made the trade but for those statements and representations, and if you further find that the defendant, in making said representations, knew they were untrue, or if he made them as of his own knowledge, without knowing whether they were true or false, and with the intent of deceiving and misleading the plaintiff, then the Court instructs the jury that your verdict must be for the plaintiff."

The other instructions given, except the one under consideration, were in harmony with this one. There was evidence to support this instruction, and, with the legal propositions, it asserts that no fault has been found. Nevertheless, the jury were told in the seventh instruction that, although they should find all these facts to exist, yet, if the plaintiff, by diligent inquiry, might have discovered that defendant's said representations were false, then he could not recover. In other words, the jury were told in this instruction that although the defendant made false representations as to material existent facts, calculated to affect the plaintiff's estimate of the value of the property, for the purpose of inducing him to trade therefor, upon which the plaintiff relied, and by which he was induced to make the trade, yet, if by diligent inquiry he might have discovered that such representations were false, then he could not recover.

We do not understand this to be the law. "It has, indeed, been laid down as a broad proposition of law, that if the means of knowledge be at hand and equally available to both parties, and the subject of the transaction be open to the inspection of both alike, the injured party must avail himself of such means, if he would be heard to say that he was deceived by the representation of the other party, unless there was a warranty of the facts." Bigelow on the Law of Frauds, p. 522. This instruction cannot be maintained even upon the broad terms of this proposition, for by it the plaintiff is precluded from recovery if he could have discovered the truth by diligent inquiry, whether the means of knowledge were at hand, or whether they were equally available to him as to the defendant or not.

It may be well, however, to note the continuing remarks of Mr. Bigelow on the general proposition. He says, page 523 *et seq.*: "But

there is serious ground for doubting the correctness of this proposition in its broad form. It will be seen upon reflection that the situation of the person to whom the misrepresentation was made is quite different in regard to means of knowledge from that of the person who made it. The latter may well be held to the duty to know the facts; no one has prevented him from knowing them. The former has been put off his guard and misled by the very representation which has been made. Indeed, a representation may as well mislead even where the means of knowledge are directly at hand as where they are not. The supposed rule in regard to means of knowledge came to be applied in this country before this distinction had been pointed out. . . . Recent authority has, however, gone far towards setting the matter right in principle; the proposition has now become very widely accepted at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact notwithstanding the fact that the means of knowledge were specially open to him. . . . It may be improbable that a man with the truth in reach should accept a representation in regard to it, but the improbability can be no more than matter of fact. If the representation were of a character to induce action and did induce it, that is enough. It matters not, it has well been declared, that a person misled may be said in some loose sense to have been negligent; . . . for it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or, 'You were yourself guilty of negligence.'" After citing many cases illustrative of the principle here stated, the learned author sums up thus, page 528: "The result appears to be not only in principle but by the weight of authority that the party to whom the representation is made is affected by means of knowledge or by notice, only where the language or conduct was not of a kind to withdraw his attention from what otherwise he would be bound to know, *i. e.*, only where the representation was not calculated to put him off his guard, as in cases of representations of value or opinion."

To use the language of another author: "The doctrine of notice has no application where a distinct representation has been made. A man to whom a particular and distinct representation has been made is entitled to rely on the representation and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn." *Kerr on Fraud*, p. 80. "No man can complain that another has relied too implicitly on the truth of what he himself stated." *Kerr on Fraud*, p. 81. The same general principle has been expressed by this Court in the following terms: "It is no excuse for, nor does it lie in the mouth of, the defendant to aver that plaintiff might have discovered the wrong, and prevented its accomplishment had he exercised watchfulness, because this is but equivalent to saying, 'You trusted me, therefore I had the right to betray you.'" *Pomeroy v. Benton*, 57 Mo. 531.

The same idea is expressed in another opinion, thus: "We doubt if it is equity to allow a sharper to insist on the fulfilment of his bargain, on the ground that his victim was so destitute of sagacity as to make no further inquiries." *Wannell v. Kem*, 57 Mo. 478.

It is not seen how instruction number 7 can be maintained without doing violence to the just and equitable principles announced in these authorities, even conceding that the parties at the time were upon an equal footing, and therefore to be treated as dealing at arm's length; but when it is considered that the defendant was the originator and promoter of the enterprise, its business manager, fully conversant with every fact of its past history and present condition, having actual knowledge of the cost of the plant, the amount of the stock and the dividend it was actually yielding, and that the plaintiff was a stranger to the enterprise, it becomes at once apparent that the means of knowledge were not in fact equally available to the plaintiff as to the defendant, and the instruction has nothing to stand upon, for, "where the parties do not stand upon equal footing, the objection to a plea or claim of false representations, that the party to whom they were made was 'negligent' in not making inquiry or examination has still less force, and would nowhere be allowed." Bigelow on Fraud, *supra*, p. 534; *Wannell v. Kem*, *supra*. So that in any view of the case this instruction must be condemned.

[Omitting part of opinion.]

For the error of the Court in giving the seventh instruction, the judgment is reversed and cause remanded for new trial. All concur.

Reversed and remanded.

MITCHELL, C. J., IN INGALLS v. MILLER.

1889. 121 *Indiana*, 191.

WHETHER the alleged representations were such as the plaintiff had a right to rely upon, or whether they were of a character reasonably calculated to deceive such a person as he was, were questions of fact for the jury. Representations might be futile and harmless when addressed to an active, sagacious, well-informed man, and yet the same scheme might utterly undo a weak minded, illiterate, old, or inexperienced man. "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves." *McKee v. State*, 111 Ind. 378 (381).

The law is not blind to the fact that communities are composed of individuals of several degrees of intelligence and capacity, nor does it declare as matter of law what representations as to existing facts may, or may not, be relied upon.

SECTION VII.

What Misrepresentations by a Party to a Contract are regarded as Non-actionable.

(a) VALUE.

HARVEY v. YOUNG.

39 Elizabeth, Yelverton, 21 a.

J. S. had a term for years, and there being a discourse between him and J. D. about buying that term, J. S. said and affirmed to J. D. that the term was worth £150 to be sold, upon which J. D. gave J. S. £150 for the term; and afterwards J. D. offered and endeavored to sell the term again, and could not obtain, nor get for the term £100, whereupon he brought an action on the case in nature of a deceit against J. S. and declared *ut supra*, and that J. S. *asseruit* to him that the term was worth so much, to which assertion J. D., *fidem adhibens*, did buy the term for so much money, but could not sell it again for so much money as was given at first, in fraud and deceit of the plaintiff to his damages, &c.; and upon not guilty pleaded it was found for the plaintiff, and alleged in arrest of judgment that the matter precedent did not prove any fraud; for it was but the defendant's bare assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such value to be sold, and the plaintiff had thereupon given and disbursed his money, there it is otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. Between Harvey and Young, Mich. 39 Eliz., as Towes of the Inner Temple said at the bar, and that he was of counsel with the defendant, *Quod nota*.

DEMING v. DARLING.

1889. 148 Massachusetts, 504.¹

HOLMES, J. This is an action for fraudulent representations alleged to have been made to one Dr. Jordan, the plaintiff's agent, for the purpose of inducing the plaintiff to purchase a railroad bond from the defendant. . . .

Among the representations relied on, one was that the railroad mortgaged, which was situated in Ohio, was good security for the bonds;

¹ Portions of the opinion are omitted. — ED.

and another was that the bond was of the very best and safest, and was an A No. 1 bond. With regard to these and the like, the defendant asked the Court to instruct the jury "that no representations which the defendant might have made or did make to Dr. Jordan in relation to the value of the bond in question, or of the railroad, its terminals, and other property which were mortgaged to secure it, with other bonds, even though false, were representations upon which Dr. Jordan ought to have relied, and are not sufficient to furnish any grounds for this action;" and also, "that each of the expressions 'and that the same' (meaning said railroad and all the property covered by the mortgage) 'was good security for said bonds,' 'that said bond was of the very best and safest, and was an A No. 1 bond,' are expressions of opinion of value, and even though false, are not such representations as Dr. Jordan had a right to rely upon, and are not enough to furnish any grounds for this action."

The Court declined to give these instructions, and instead instructed the jury that "an expression of opinion, judgment, or estimate, or a statement of a promissory nature relating to what would be in the future, so far as they were expressions of opinion, if made in good faith, however strong as expressions of belief, would not support an action of deceit."

It will be seen that the fundamental difference between the instructions given and those asked is that the former require good faith. The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. *Pike v. Fay*, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (*Teague v. Irwin*, 127 Mass. 217), and as to which it always has been "understood, the world over, that such statements are to be distrusted." *Brown v. Castles*, 11 Cush. 348, 350; *Gordon v. Parmelee*, 2 Allen, 212; *Parker v. Moulton*, 114 Mass. 99; *Poland v. Brownell*, 131 Mass. 138, 142; *Burns v. Lane*, 138 Mass. 350, 356. *Parker v. Moulton* also shows that the rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. Moreover, in this case, market prices at least were easily accessible to the plaintiff.

The defendant was known by the plaintiff's agent to stand in the position of a seller. If he went no further than to say that the bond was an A No. 1 bond, which we understand to mean simply that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case, even if he made the statement in bad faith. See, further, *Veasey v. Doton*, 3 Allen, 380; *Belcher v. Costello*, 122 Mass. 189. The rule of law is hardly to be regretted, when it is considered how

easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed.

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Exceptions sustained.

S. K. Hamilton, for defendant.

R. Lund (*W. C. Jordan* with him), for plaintiff.

SECTION VII. (*continued.*)

(b) RENTAL. — PRICE PAID ON A PREVIOUS SALE.

EKINS *v.* TRESHAM.

15 Car 2. 1 Levinz, 102.

CASE, That whereas the plaintiff and defendant were in treaty for the sale of a messuage; the defendant falsely and fraudulently affirmed it was let at £42 per annum; whereto the plaintiff gave faith, gave him £500 for it, where in truth it was let at £32 per annum only. After verdict for the plaintiff, it was moved in arrest of judgment that the action did not lie; as for saying that a thing is of a greater value than it is, without warranty no action lies. *Yelv. 20.* No more will it for saying that it is demised for more than in truth it is; for the party might inform himself from the tenant, and a warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is apparently blind of one of them. But by the Court, tho' an action will not lie for saying that a thing is of greater value than it is (nor by *Wyndham*, it is perjury to swear it, because value consists in judgment and estimation, wherein men many times differ); yet to affirm that a thing is demised for more than it is is a falsity in his own knowledge, and the party who is deceived may for such deceit have an action, for perhaps the lease is by parol, or the tenant will not inform the purchaser what rent he gave. And after it had been twice moved judgment was given for the plaintiff in *Trinity*, 15 Car. 2, by the whole Court.

DOBELL *v.* STEVENS.

1825. 3 *Barnewall & Cresswell*, 623.

CASE for a deceitful representation. The declaration stated that before the time of committing the grievance thereafter mentioned, defendant kept a public-house, and was possessed of a lease of the

house for a certain term of years, and thereupon the plaintiff, at the request of the defendant, on, &c., at, &c., was in treaty with defendant to buy his interest in the said house for a certain sum of money, to wit, the sum of £460, and also to buy the household furniture and fixtures and stock in trade at a valuation; and defendant falsely, fraudulently, and deceitfully pretended and represented to the plaintiff that the returns or receipts for the spirits sold in the said public-house had been and then amounted to the sum of £160 per month; and that the quantity of porter sold in the house amounted to seven butts per month, and that the tap was let for £82 per annum, and two rooms in the public-house for £27 per annum; and by such representation then and there induced the plaintiff to buy the said lease of the house at the price of £460. The declaration then averred the falsehood of each particular of the statement. At the trial before Littledale, J., at the London sittings, after last term, the plaintiff proved that whilst the treaty for the purchase was going on a representation was made, as stated in the declaration, and that it was false. On the cross-examination of his witnesses, it was proved that the defendant's books were in the house at the time of the treaty, and might have been inspected by the plaintiff, and that they would have shown the real quantity of spirits and porter sold in the house. The plaintiff, however, did not examine them. A written memorandum of the bargain was afterwards drawn up, and an assignment of the lease was executed; but neither of those instruments contained any mention of the defendant's representation. The learned judge left it to the jury to say whether the representation was fraudulent, and they found a verdict for the plaintiff.

Gurney now moved for a rule *nisi* for a new trial. The parol evidence of the defendant's representation was inadmissible in this case. The contract having been reduced into writing, the parties must be bound by that, and cannot add to it by evidence of previous conversations. *Pickering v. Dowson*, 4 Taunt. 779. [ABBOTT, C. J. In that case Gibbs, J., says, "If there had been any fraud it would not have been done away by the contract." BAYLEY, J. The same view of the point was taken by my Lord Chief Justice in *Kain v. Old*, 2 B. & C. 627.] The fraud there alluded to is some fraudulent conduct, whereby the party deceived is prevented from discovering the falsehood of the representation. Here the plaintiff had the means of knowledge within his reach, and neglected to make use of them. In *Powell v. Edmunds*, 12 East, 6, it appeared that an auctioneer, at a sale by auction, made a statement not noticed in the conditions of sale, and it was held that parol evidence of that statement had been properly rejected. Lord Ellenborough says, "The only question which could be made is, whether if by the collateral representation, a party be induced to enter into a written agreement different from such representation, he may not have an action on the case for the fraud practised to lay asleep his prudence." At all events, therefore, the propriety of admitting such evidence has been considered very questionable by a high authority, and is a point worthy of further discussion.

ABBOTT, C. J. Whether any fraud or deceit had or had not been practised in this case was peculiarly a question for the jury; nor has any complaint been made against the mode in which that question was presented to their consideration. If, then, this motion be sustainable at all, it must be sustainable on the ground that evidence of a fraudulent or deceitful representation could not be received, inasmuch as it was not noticed in the written agreement, or in the conveyance which was afterwards executed by the parties. The case of *Lysney v. Selby*, 2 Ld. Raym. 1118, is to the contrary of that position, and precisely analogous to the present case. That was an action against the defendant for falsely and fraudulently representing to the plaintiff that certain houses of him (defendant) were then demised at the yearly rent of £68, to which plaintiff giving credit, bought the houses for a large sum of money, to wit, &c., and an assignment was afterwards executed to him; whereas, in truth and in fact, the houses were at that time demised at the yearly rent of £52 10s., and no more. After verdict for the plaintiff a motion was made in arrest of judgment, on the ground that it did not appear that the assertion was made at the time of the sale. Lord Holt says, "If the vendor gives in a particular of the rents, and the vendee says he will trust him, and inquire no further, but rely upon his particular, then if the particular be false an action will lie." Here the plaintiff did rely on the assertion of the defendant, and that was his inducement to make the purchase. The representation was not of any matter or quality pertaining to the thing sold, and therefore likely to be mentioned in the conveyance, but was altogether collateral to it, as was the rent in the case of *Lysney v. Selby*. That case appears to me to be exactly in point, and the jury having found that that which was untruly represented was fraudulently and deceitfully represented, I think that we ought not to grant a rule for a new trial.

Rule refused.

HOLBROOK v. CONNOR.

1872. 60 Maine, 578.

ON EXCEPTIONS and motion to set aside the verdict as against law and the weight of evidence, and because the allegations do not support it.

Case for deceit in the sale of land.

The defendant, Lancey, claimed to be the owner of two hundred acres of land in Canada.

The other defendant, acting as the agent of Lancey, came to Maine for the purpose of getting up an association of individuals to whom he might sell the land for the purpose of manufacturing oil. A paper was drawn and signed by Connor, for Lancey, therein stipulating, among other things, that Lancey would put fifty acres of the land into five hundred and sixty shares, of twenty-five dollars each; and when the

\$44000 in all.

shares were all subscribed and paid for, the subscribers were to be the equitable owners of the real estate, in proportion to the number of shares subscribed and paid for by each.

All the shares were taken, the plaintiff having subscribed for twenty, for which he paid five hundred dollars.

Subsequently the land was conveyed in trust for the benefit of the subscribers.

The plaintiff in his declaration alleged that the defendants conspired to cheat and defraud him, and that in subscribing and paying for his shares he relied upon representations of the defendants, — “that the said lands had large deposits of oil in them, and were of great value for the purposes of digging, boring for, and manufacturing oil; and that said Lancey and said Connor had actually paid the sum of \$14,000 therefor.”

There was testimony tending to prove that these representations were false and fraudulent, and that the defendants actually paid a much less sum for the land thus sold.

The remainder of the case, so far as actually decided, sufficiently appears in the opinion.

The verdict was for the plaintiff.

D. D. Stewart, for the plaintiff.

A. Libbey & G. W. Whitney, for the defendants.

DANFORTH, J. [after deciding another point]. The only other allegation on which the plaintiff rests his action is that which relates to the price paid for the land.

We think that such a statement, though false, is not sufficient to sustain an action.

It was early decided that no action would lie against a man for falsely declaring that a third person would have given him so much for his land. *Roberts on Frauds*, 524, and cases cited.

This was recognized as good law in *Cross v. Peters*, 1 Maine, 389, and, so far as we are aware, has never since been questioned.

In *Medbury v. Watson*, 6 Met. 246–260, it was held that a false statement by a third person as to what the owner paid is actionable. But in the same case in the opinion, on p. 259, it is said that “in regard to affirmations and representations respecting real estate, the maxim of *caveat emptor* has ever been held to apply. When, therefore, a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it, such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable.”

In *Hemmer v. Cooper*, 8 Allen, 334, in the opinion, it is said, “The representations of a vendor of real estate to the vendee, as to the price paid for it, are to be regarded in the same light as representations respecting its value. A purchaser ought not to rely upon them; for it is settled that, even when they are false, and uttered with a view to

deceive, they furnish no ground of action." And that was the only point raised in the case.

In *Manning v. Albee*, 11 Allen, 622, Gray, J., says: "This Court has repeatedly recognized and acted upon the rule of common law, by which the mere statements of the vendor, either of real or personal property, not being in the form of a warranty, as to its value, or the price which he has given or been offered for it, are assumed to be so commonly made by those holding property for sale, in order to enhance its price, that any purchaser who confides in them is considered as too careless of his own interests to be entitled to relief, even if the statements are false and intended to deceive."

As late as *Cooper v. Lovering*, 106 Mass., on p. 79, Ames, J., in the opinion, says: "It has been repeatedly decided that representations of a vendor as to the value or cost of the property to be sold, or as to offers for it made by others, even though false, are not representations upon which a purchaser ought to rely, and are not sufficient to furnish any ground of action."

In *Mooney v. Miller*, 102 Mass. 220, the same doctrine is recognized.

The same doctrine has been held in our own State, so far as the question has been discussed.

In *Long v. Woodman*, 58 Maine, 52, *Hemmer v. Cooper*, is recognized as good law; and the principle is still more fully discussed in *Martin v. Jordan*, 60 Maine, *ante*.

In a late English work of good authority, representations by the vendor as to price paid by him for land, are regarded in the same light as representations respecting its value, or the offers which have been made for it. It is there said: "A purchaser is not justified in placing confidence on them." Kerr on Fraud and Mistake, 88.

This view seems to have been considered as well-settled law by all the authorities bearing upon the question, so far as we have been able to ascertain, with the exception of *Sanford v. Handy*, 23 Wend. 260, and *Van Epps v. Harrison*, 5 Hill, 63. In the latter of these cases Bronson, J., says: "In *Sanford v. Handy*, it was intimated that a vendor would be liable for misrepresentations as to cost, but the point was not decided." He then states his own convictions as decidedly the other way. And after giving his reasons for his own views with much force, he closes by saying, "the majority of the Court think otherwise."

This case decided by a bare majority, with the reasons given all against the decision, is the only case directly in point, in conflict with the authorities before cited.

The other cases cited in the argument for the plaintiff are decided upon different principles, and are not in conflict with those relied upon in defence. Some of them were decided on the ground that a confidential relation existed between the vendor and vendee. This was the case in *Bagshaw v. Seymour*, 93 Eng. Com. Law, 373, and *Clark v. Dixon*, 95 Eng. Com. Law, 452, where the defendants acted in behalf of, and as agents for, the plaintiffs. In *Bradley v. Poole*, 98

Mass. 169, and many of the cases cited, the representations were as to the condition of the company and the amount actually paid in, — facts upon which the value of the shares sold materially depended. Other cases rest upon statements of the amount paid for bonds in the market, or rents actually paid for lands under lease, showing the actual market value of the property sold. All these cases are widely distinguishable from the one at bar. What a person may have paid for land is one thing, its actual market value another, and often a very different thing. The purchaser of land for a company, though not especially appointed as agent therefor, would not be permitted to deceive, or even make a profit out of those for whom he assumed to act, and who subsequently adopt or ratify what he has done. In the case at bar the defendants, in making the purchase of the land, were not the agents of the association, nor did they assume to act for or in their behalf. The purchase was made before the company was formed, and, so far as appears, before its organization was contemplated. The contract of the parties does not refer to the original purchase. So far as the land is referred to, it provides simply for a sale, which is completed by a deed subsequently given. True, it was sold for the purpose of forming a joint-stock company, of which the defendants were to be members; still, it was but a sale, and the parties to this case stand to each other in the relation of grantor and grantee, and no other, and in the writ are so declared to be. Viewing the authorities, then, as bearing upon the admitted facts of this case, they would seem to be nearly all one way, very clearly showing that a false representation by the vendor of the price paid for land will not lay the foundation for an action. And if we add to these the long list of cases in which it has uniformly been held that misrepresentations as to value and quality, and even of offers made by third persons, though fraudulent, are not actionable, it would seem that the law upon the question we are now considering must be free from doubt. If we examine the question upon principle the result must be the same. The statement of the vendor that he paid a certain price for his land, if true, can be no more than an indication of his opinion of its value, and when we consider the various motives which may, and often do, actuate men in making their purchases, and especially when it is done for the purposes of speculation, it is but the slightest proof of such an opinion. It is certainly of no more value than the offer of a third person, and this is considered of so little worth, that it is not legal testimony in a case where the market price is in issue.

It is however, claimed that the price paid is a definite fact, the truth or falsity of which is susceptible of satisfactory proof, while assertions of quality and value are necessarily matters of opinion which are too uncertain for judicial cognizance. This may be true, and the same may be said of offers made as well as many other representations not actionable. But it should also be remembered that a misrepresentation, to be the foundation of an action, must relate, not only to an existing fact, but to a material one; one which will enable the purchaser more

intelligently to form his own opinion of the value of the property. Now, as we have already seen, the price paid, if correctly stated, is but an uncertain indication of the vendor's opinion. It gives no light whatever as to any inherent fixed quality or description which goes to make up the value, and in this respect is not distinguishable from an offer made, except that it is even more unreliable, as an indication of value. The instructions of the presiding justice not being in conformity with these views, and being inapplicable to the case as presented by the testimony, the exceptions must be sustained, and it is unnecessary to consider the various other points raised.

Exceptions sustained.

CUTTING, WALTON, BARROWS, and VIRGIN, JJ., concurred.

The following dissenting opinion was delivered by

DICKERSON, J. The exceptions present the question, whether a false representation, fraudulently made, as to the cost of the property is an element of fraud in an action of deceit to recover damages for the injury sustained on account of such representation. Though the authorities are not in perfect accord upon this question, yet we think that the weight of authority, as well as the better opinion, is decidedly in favor of the affirmative.

While misrepresentation of the cost of property does not ordinarily increase its value, it is a material fact, and naturally calculated to mislead the purchaser by its tending to enhance its value, and give it an attractiveness and firmness beyond that given by the force of mere opinion. Especially is this the case when the vendee reposes confidence in the knowledge, sagacity, and integrity of the vendor, who has himself alone examined the property.

When the property is to be put into a joint-stock company, the cost price is the basis for fixing the capital stock and the price value of the share; and when the owner becomes a member of the company his investment is equalized with that of the other members of the company, though the percentage actually paid in by him may fall far short of that paid in by them. It is easy to see how the fact, that a man of known sagacity in matters of business, with favored opportunities for examining the property and judging of the prospects of the enterprise to be projected upon it, is willing to pay a large sum for such property, put it into a joint-stock company at cost, and share his profits in common with the other shareholders, is calculated to increase other persons' estimate of the value of the stock, and induce them to become its purchasers. Does the law hold a vendor harmless who makes use of the confidence which these considerations awaken among his friends and acquaintances to obtain from them their money or other property for a moiety of its value?

Representation of cost is different from representation of value. The one is the statement of a fact, while the other is the expression of an opinion. Value is a matter of judgment and estimation, about which

men may differ. The question of value, too, is one open alike to the vendee and vendor for inquiry, examination, and proof; the vendee, by the exercise of common prudence, may ascertain the truth of a representation of value and save himself from loss. Not so with a representation of cost. This is not an opinion, but a fact, specially confided to the knowledge of the owner and his vendor; and they may sustain such confidential relations toward each other that no prudence can discover the falsity of the representation. The same distinction between the assertion of a fact and the expression of an opinion or judgment is recognized in actions of warranty or deceit founded on representations concerning the essential condition or qualities of the property offered for sale and exchange. This distinction is, moreover, expressly recognized in the decisions of courts of the highest authority upon the identical question under consideration. The general principle is, that though the vendor need not speak, yet if he does he should speak the truth.

If we pass from general principles to the authorities, we find that the English cases present an unbroken chain of decisions in harmony with these views. In *Ekins v. Tresham*, 1 Lev. 102, it was held that a false statement that the property was rented for a higher sum than was actually paid, whereby the plaintiff was deceived and induced to pay a high price for the property, afforded good cause of action. The same principle has been affirmed and applied in subsequent cases, the courts assigning as a reason for distinguishing between such cases and a false representation of value, that "the value of the rents is a hard thing to be known, and secret, known to none but the landlord and the tenant, and they might be in confederacy together." *Risney v. Selby*, 1 Salk. 214.

In *Bagshaw v. Seymour*, 4 C. B. (N. S.) 873, the Common Bench held the chairman of the directors of an Australian gold mining company responsible for causing its stock to be put on the Stock Exchange list, by a false representation as to the amount of money paid, by which the plaintiff was induced to buy some of its shares.

The same Court, in *Clarke v. Dickson*, 6 C. B. (N. S.) 453, held a director of a lead and copper mining company liable to a party who had been induced to purchase stock in that company, because of the false representation, fraudulently made, that the property had been purchased at a much greater price than was actually paid.

That case is very similar to the case at bar in its facts and principles, and the decision of the Court is directly in point. The same doctrine was held by the Court of Exchequer in *Bedford v. Bagshaw*, 4 H. & N. 538.

The Court of Errors of New York, in *Sanford v. Handy*, 23 Wend. 268, held that misrepresentation of the cost of land rendered the vendor liable; and this decision was subsequently affirmed by that Court in *Van Epps v. Harrison*, 5 Hill, 70.

In *Page v. Parker*, 43 N. H. 369, the Court held the same doctrine, and in commenting upon the case of *Van Epps v. Harrison*, say "We think the holding of the Court was right."

The Court in this State held that false and fraudulent representations of the value and amount of the income of real estate, by which a party was induced to take a lease of the premises, rendered the lease void, on the ground, as stated by Shepley, J., who delivered the opinion of the Court, that a representation relating to the income or rent of an estate does not come within the rule that the seller is not bound by representations of the value of the property sold, because the knowledge of the value of the income in such case may be, and actually is, confined to one party, and the other can be presumed to ascertain it accurately only from him, or from those standing in a confidential relation to him. *Irving v. Thomas*, 18 Maine, 424.

The principle upon which that decision is thus put applies, at least, with as great force to misrepresentations as to the cost of property; for it is obvious that the means of ascertaining the truth of representations in regard to income are quite as accessible as the means of determining the truth of representations of cost. While the value of the income may ordinarily be obtained from inquiry and on examination of the premises, a knowledge of the cost price must be sought for in more recondite quarters.

Chief-Justice Shaw, in *Hazard v. Irwin*, 18 Pick. 105, recognizes the distinction between a false averment in matters of fact and a like falsehood in matters of judgment, opinion, and estimate, and thus illustrates the difference: "If the owner of an estate affirm that it will let or sell for a given sum, when in fact such sum cannot be obtained from it, it is in its own nature matter of judgment and estimate, and so the parties must have considered it; but if an owner falsely affirm that the estate is let for £30, when in fact it is let for £20, it is fraud, because the owner knows the fact, and on inquiry by the vendee the tenant might refuse to inform him, or give him false information."

Mr. Justice Metcalf, also, in *Brown v. Castles*, 11 Cush. 348, makes the same distinction, and cites the New York cases, which hold that false and fraudulent representations in respect to cost are actionable as coming within the rule applicable to misrepresentations in matters of fact, and as distinguishable from representations of value, former offers, probability, and like matters of opinion.

So the Court, in *Medbury v. Watson*, 6 Met. 246, held a third party responsible for falsely and fraudulently representing to the plaintiff that the owner of certain real estate paid a larger sum for it than he actually paid, whereby the plaintiff was induced to pay the same sum therefor, and was greatly damaged. But the Court, in deciding that case, say that the averments in the declaration would not have been sustained if the false representations had been made by the vendor to the vendee, thus for the first time in the history of jurisprudence upon this subject, as it is believed, distinguishing between representations made by the owner and those made by a third party, and holding the latter alone actionable, when the representations relate to the cost of the property. There was nothing in the case that called for this remark, nor do the

authorities cited warrant it, and the reasoning by which it is sought to be fortified fails to convince us that it is good law, sound philosophy, or consistent with enlightened views of human nature. We are not quite prepared to say that persons are naturally more inclined to tell the truth about their neighbor's property than they are about their own, or that the statements of a third party in respect to another's property is more likely to deceive a purchaser than those made by the owner himself. Besides, the *dictum* in that case is in direct conflict with the then uninterrupted series of decisions of the courts in England and in this country, and, as it seems to us, repugnant to reason and public policy.

The Court in Massachusetts, however, recognized the distinction suggested in *Medbury v. Watson* as law, and in a very brief opinion, drawn by the learned member of the Court who was counsel for the defendant in that case, without citing any other authorities than were there cited, held that fraudulent misrepresentations as to the price paid for real estate by the vendor will not support an action for deceit in the sale of it. *Hemmer v. Cooper*, 8 Allen, 334.

Our objections to these two cases in Massachusetts may be thus stated: both reason and authority seem to us to be opposed to the distinction set up in the former case, and to recognize the distinction denied in the latter case. In view of these considerations, it is, perhaps, not too much to say that these cases, for some cause, failed to receive that thorough examination and careful consideration which have generally marked the decisions of the learned Court in Massachusetts.

That Court already seems to have felt the embarrassment which those cases present in more recent decisions. It held, in *Manning v. Albee*, 11 Allen, 522, that false and fraudulent representations as to the market value of certain railroad bonds entitle the purchaser to rescind the contract. In delivering the opinion of the Court in that case, Mr. Justice Gray felt constrained to say that the utmost limits of the rule which does not recognize a false representation of value as an element of fraud have been reached in *Hemmer v. Cooper*, in applying it to statements of the price paid by the person making them.

Again the Court in Massachusetts enunciate principles and cite authorities in *Bradbury v. Poole*, 98 Mass. 182, which seem to us irreconcilable with the doctrine of *Hemmer v. Cooper*. In view of the great weight of authority upon this subject and the later decisions in Massachusetts, the *dictum* in *Medbury v. Watson*, which ripened into law in *Hemmer v. Cooper*, can hardly be said to be regarded as law in that State at the present time.

The rule of law upon this subject we now consider as settled, that where a vendor makes a false and fraudulent representation as to the cost of the property, and the vendee reposes confidence in such representation, and is deceived and injured thereby, he may maintain an action for the deceit against the vendor to recover the damages for the injury he has sustained. Such representation is not to be excluded

from the consideration of the jury, either on the ground that it is a mere matter of opinion, or is so commonly made by property-holders that any purchaser who confides in it is to be considered too careless of his interests to be entitled to relief; but it is a fact proper to be submitted to the consideration of the jury in an action of deceit upon the question whether a fraud has actually been committed and an injury sustained.

[Omitting remainder of opinion.]

KENT, J., concurred [in the dissenting opinion].

SECTION VII. (*continued*).

(c) LAW.

THOMPSON v. PHCENIX INSURANCE CO.

1883. 75 *Maine*, 55.¹

THE case is sufficiently stated in the opinion.

E. O. Greenleaf, for plaintiff.

Nathan and Henry B. Cleaves, for defendants.

SYMONDS, J. On demurrer, to a declaration in case alleging that the defendants, by fraud, induced the plaintiff to cancel for two hundred and fifty dollars a policy of fire insurance for one thousand dollars, after the loss insured against had occurred.

The arguments upon the demurrer raise the single question whether the representations made by the defendants to procure the settlement, admitting all that the declaration avers in this respect, were in the legal sense fraudulent, so as to support an action to recover the damages which the plaintiff sustained, by relying and acting upon them.

The first count of the declaration sets forth that the company, "well knowing the premises, but intending to cheat and defraud the plaintiff out of the benefit of his said policy, and the money due him thereon, fraudulently and deceitfully represented to the plaintiff, that by reason of his not living in the house at the time of its being burned, he had so increased the risk that the company was not bound to pay anything, that the policy was null and void and of no effect, benefit, or use to the plaintiff." The second count charges, substantially, the same fraudulent representation on the part of the authorized agent of the company.

1. If these declarations of the agent of the insurance company are regarded as statements of the law of insurance, of the legal conditions on which the right of recovery in such cases depends, they are not actionable, though false. The cases cited for the defendants are sufficient, if authority or argument were needed, to support the statement

¹ Statement of facts, and arguments, omitted. — ED.

that under such circumstances a man has not a right to rely, except at his own peril, upon the representations of the avowed agent of the adverse interest, as to what the law will or will not do, or will or will not permit to be done. Common prudence and common sense would seem to be, in all ordinary cases, sufficient safeguards against frauds of that character; and the declaration does not aver exceptional circumstances to give the right of action in the present instance. Compare *Rashdall v. Ford*, L. R. 2 Eq. 750.

[Part of opinion omitted.]

Our conclusion is, that whether the representations set forth in the declaration, be regarded as of law, or of fact, they are not sufficient to support the action. In either case they were expressions of opinion from the agents of a corporation whose interests were known to be directly hostile to the plaintiff, and as a prudent man he ought not to have relied upon them. The valuable opinions in *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283, and *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105, cited for the defendants, were rendered upon facts approaching more or less nearly to the facts of this case as set forth in the pleadings, and tend strongly to support the conclusion we have reached.

Exceptions sustained.

JESSEL, M. R., IN EAGLESFIELD v. LONDONDERRY.

1876. *Law Reports, 4 Chancery Division*, 702, 703.

A MISREPRESENTATION of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, "You may, she is a single woman of large fortune." It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, "Now, you see, the lady is single," that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law.

There is not a single fact connected with personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas.

It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to £10,000 consols involves all sorts of law.

MORELAND *v.* ATCHISON.

1857. 19 *Texas*, 303.¹

APPEAL from Grayson.

The plaintiff's petition contains, in substance, the following allegations:—

Moreland purchased of Atchison a certain tract of land. One Boon had undertaken to pre-empt the land, and had sold his interest to Atchison, but had not executed a conveyance. At Atchison's request, Boon conveyed the land directly to Moreland, who had bargained with Atchison for it. Moreland paid Atchison in part, and gave him notes for the balance of the purchase-money. At the time when Moreland made the purchase of Atchison, he was a stranger in the country, and was an entire stranger to and unacquainted with the land system of Texas, having just moved into the State. Atchison represented himself as an old settler in Texas, and entirely familiar with the lands and with the laws governing land titles in Texas; and corruptly and fraudulently represented to Moreland that he had a good title to the land. Moreland was induced to purchase the land by these representations. Atchison did not, in fact, have any title to the land, as claiming through Boon or in any other way. Moreland acquired no title by the purchase and deed. At the time Boon made his application to pre-empt the same, it was not subject to be pre-empted or located, because it was situated in "Peters' Colony;" and, by law, all persons were prevented from pre-empting or locating any lands in said colony, except by virtue of colony certificates.

Moreland tendered back to Atchison the deed, and offered to release any interest he might have acquired by the purchase. He prayed for

¹ Statement abridged. — ED.

judgment against Atchison for the amount he had paid to Atchison; also to recover damages for the fraud practised on him by Atchison; and also that Atchison be compelled to surrender the notes.

Defendant demurred, and also claimed damages in reconvention. The Court sustained the demurrer; and also, after trial, rendered judgment in favor of defendant for one of the claims set up in reconvention.

Evarts & Hendricks, for appellant, cited Chitty on Contracts, 278, 587; 2 Starkie Ev. 340; 1 Story Eq. Sec. 208; 2 Kent, Com. 471, (7th ed.); *York v. Gregg*, 9 Texas, 95.

J. T. Mills, for appellee.

WHEELER, J. Whatever differences of opinion adjudged cases may exhibit, as to the cases where the purchaser of land will be entitled to have the contract rescinded, or to be relieved against securities given for the purchase money, where there is no charge of fraud, it is clearly settled beyond controversy that Chancery will decree a return of the purchase money for insufficiency of title, even after the purchase has been carried completely into execution, by delivery of the deed and payment of the money, and whether the deed was with or without covenants, provided there had been a fraudulent representation as to the title. *Edwarde v. McLeary*, Cooper's Eq. R. 308; *Fenton v. Browne*, 14 Ves. 144; *Denston v. Morris*, 2 Edwards' Ch. R. 37; 2 Kent, Com. 471. The petition avers such fraudulent representation; and the only question is whether it was of a matter respecting which the party can claim to be relieved, on the ground of the deception and fraud, — whether he was not bound to know the law, which disabled the defendant from making title, and whether, to grant him relief would not be to relieve against ignorance or mistake of law. The maxim *ignorantia legis neminem excusat* is respected equally in courts of equity and law. The legal presumption is that every man who is not *non compos mentis* knows the law where he knows the facts; and this presumption, though arbitrary and false in fact, is founded upon reasons of sound policy; for although a thorough knowledge of the law presupposes a life devoted to the laborious study of its principles, and in the application of the knowledge thus acquired, to the complicated affairs of men, there will questions arise upon which the best informed will differ in opinion, and no such thing as absolute certainty can be attained, yet without some arbitrary rule, imposing upon all the duty of well considering and understanding the consequences of their acts and contracts, there would be no limit to the excuse of ignorance, no safety to society, and no security in any obligation. The law presumes therefore that every man who makes a contract, acts advisedly and with a knowledge of its legal effect and consequences. The question whether, in any case, mere ignorance or mistake of law will entitle a party to relief, has been much discussed by Judges and Commentators, and is still a disputed question. 1 Story's Eq. Ch. 5, Sec. 111 to 138. Judge Story says that "agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally held

valid and obligatory. The doctrine is laid down in this guarded and qualified manner, because it is not to be disguised that there are authorities which are supposed to contradict it, or at least to form exceptions to it." *Id.* Sec. 116. Chancellor Kent was equally guarded in his statement of the rule, in *Storrs v. Baker*, 6 Johns. Ch. R. 169, 170. The Supreme Court of the United States, in *Hunt v. Rousmanier*, 8 Wheaton, 214, while they expressed a decided affirmation of the general rule, qualified it by the admission that it was not universal, and that there may be cases in which mere ignorance of law alone would entitle a party to relief in a civil matter, on the ground of the presumption of imbecility or fraud which might arise. In noticing this case, Chief Justice Robertson, in delivering the opinion of the Court of Appeals of Kentucky, in *Underwood v. Brockman*, 4 Dana, 309, where he examines the subject in an elaborate opinion, says the Court might have added also the additional and more conclusive and plain ground of a want of consideration. In South Carolina and Kentucky the universal application of the general rule is not admitted. 2 McCord Ch. 455; 2 Bail. 623; 1 Hill, Ch. 242; 4 Dana, 309. The review of the decisions by Judge Story shows that there are very many apparent, and he dares not deny that there are some, though he thinks but few, real exceptions to the general rule; and he says they generally stand upon some very urgent pressure of circumstances. Story's Eq. Sec. 137.

The general rule, it has been truly said, is justified by considerations of public policy; and yet so harsh a rule, founded upon a presumption so arbitrary, ought to be modified in its application, by every exception which can be admitted without defeating its policy. "If there be, at the time a contract is entered into, a mistake of the law applicable thereto, which entirely modifies it, to enforce such an agreement is to create a new contract, which was never assented to understandingly, and to impose duties and liabilities, which the party never contemplated assuming. So, also, if there be a promise, or an actual performance of a contract, upon the supposition of liability, that liability becomes the very basis of the contract, and its non-existence being an utter failure of consideration, an executory or executed contract founded thereupon, would, by one of the first principles relating to contracts, be wholly void." Story on Con. 407, note.

Admitting the rule that ignorance of the law, with a knowledge of the facts, cannot generally be set up as a defence, (6 Johns. Ch. R. 169, 170,) there are other elements in the present case which bring it within the exceptions, or take it out of the operation of the rule, and entitle the party to relief. It is not a case of mere ignorance of law, unmixed with fraud and ignorance of fact. There was both fraud and ignorance of fact as well as law. And it has been the constant practice of Courts of Chancery to grant relief, where the case did not depend upon a mere mistake of law stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, or advantage taken of

another's situation. Story's Eq. 120, *et seq.* and notes. There was, in this case, misrepresentation and fraud, if corruptly deceiving one as to matter of law amounts to fraud, in a legal sense; and we do not doubt that it may, where, as in this case, advantage is taken of the ignorance of the party. An immigrant arrives in the country, and his first object is to procure a home. He, of course, is ignorant respecting the land titles of the country; and he meets with an old citizen who professes familiarity with them, and who proposes to sell him land to which he assures him he had a perfectly good title. The immigrant relies on his superior information, and trusts to his representation; and has he not a right to do so? When one who has had superior means of information professes a superior knowledge, even of the law, and thereby obtains an unconscientious advantage of another, who is confessedly ignorant, and who has not been in a situation to be informed, is not the injured party as much entitled to relief, on the ground of fraud, as if the misrepresentation were of a matter of fact? We think he is. The plaintiff is not supposed to have had a knowledge of the laws of this State until he came within their influence. Ignorance of the law signifies ignorance of the laws of one's own country; ignorance of the law of a foreign government is ignorance of fact. *Haven v. Foster*, 9 Pick. R. 112, 130. To deny him relief against a ruinous contract, induced by the misrepresentation of one who professes a knowledge of the subject, and who has been in a situation to be informed, while he has not, and when, if he had been informed he would not have made the contract, would not only be extremely unreasonable and unjust to the injured party, but it would be giving a premium to the other party for taking advantage of his ignorance. It would be plainly repugnant to good morals and fair dealing. There can be no good reason why the law, in this case more than any other, should suffer one who has no right or title to retain that which is the property of another.

But the truth or falsehood of the representation did not depend upon a mere question of law; nor would a knowledge of the law alone have enabled the plaintiff to detect its falsehood. He might have known that the land included within the boundaries of the colony was reserved by law from location and pre-emption, and still have been ignorant of the fact that this land was within the bounds of the reserved territory. Whether the defendant had or could make a good title to the land was a question of fact as well as law, no less in this than in other cases where there had been a prior appropriation of the land. The misrepresentation therefore was of matter of fact as well as law. The consequence is that the defendant has obtained the property of the plaintiff without consideration, and by means which does not divest the latter of his title, and ought not, on principle, to deprive him of his remedy. We conclude that the plaintiff has stated a case which entitled him to his action to recover back his property or its value; and that the Court erred in dismissing the petition. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

SECTION VII. (*continued*)

(d) GENERAL COMMENDATION.—QUALITY.—DESCRIPTION INVOLVING MATTERS OF FACT.—BOUNDARIES.

STEWART v. STEARNS.

1884. 63 *New Hampshire*, 99.¹

CASE, for deceit in the sale of a stock of goods. Facts found by a referee. By a writing made January 6, 1880, the defendant agreed to sell his stock of goods in Concord to the plaintiff "for what said goods were worth, or would cost January 1, 1880, . . . ; that said Stewart may show the prices of each class of goods, as appraised or rated in the first instance by said Stearns to persons who are acquainted with the value of such goods, and that such persons shall make such changes in the prices carried out by said Stearns as shall correct any mistake made by his estimate, and shall make the price conform to their estimate, and the latter estimate shall be the price which said Stewart shall pay for the same . . ."

Prior to the date of this agreement, the defendant had been in business in said store about fifteen years. The plaintiff had never been in that business, and had no more knowledge of it than men in general. Immediately after making said agreement, the parties proceeded to make an inventory of the stock of goods, the defendant, and one Heath, his clerk, calling off the goods, with quantity and price, and Arthur C., son of the plaintiff, entering the same on the book. The plaintiff was present part of the time during the taking of the inventory, but took no active part, though he had an opportunity to examine the goods as much as he pleased. He was not acquainted with the prices of the different classes of the goods, but allowed the defendant and Heath to fix the prices. The prices fixed by the defendant and Heath and put upon the inventory were the same prices for which new goods of the same grade, pattern, design, fashion, and style could be bought January 1, 1880. At the time the parties began to talk of the trade, the defendant knew that the plaintiff was unacquainted with such goods as made up the stock in his store; and the defendant, both before the making of the written agreement and during the taking of the inventory, did represent and state to the plaintiff, in substance, that his stock was clean and desirable, and that the goods were of good styles and salable. Relying upon the representations of the defendant, the plaintiff did not make a careful examination of the goods, and did not avail himself of the means provided in the written agreement for fixing the prices of the goods. In the course of his business during the spring and summer of 1880, in selling the goods bought of the defendant, the

¹ Part of case omitted; also arguments. — ED.

plaintiff first learned that the goods were not such as the defendant had represented them to be, and that the prices paid exceeded the fair value at the time of the trade, and first made complaint to the defendant in June, 1880, but did not then or at any time call in the referees named in the agreement to revise and correct the prices fixed in the inventory.

The total price paid by the plaintiff for the stock exceeded the fair value of the same at the time of the sale in the sum of \$677.20.

Counsel for the defendant claimed that under the written agreement the plaintiff was to pay the prices of new goods of the same grade, pattern, design, fashion, and style of this stock, instead of the actual value of the stock as it existed at the time of the sale; that the rule *caveat emptor* should be applied; and that if the plaintiff was dissatisfied with the prices fixed, he was bound to call in the referees named in the written agreement to correct such prices. Upon these matters of law the referee ruled against the defendant.

Ray & Walker, and W. L. Foster, for plaintiff.

J. Y. Mugridge, and Chase & Streeter, for defendant.

CLARK, J. The finding of the referee is authorized by the facts appearing in the case. If the defendant made false and fraudulent representations upon material matters, calculated and intended to mislead and prevent examination and inquiry as to the quality and character of the stock of goods, to induce the plaintiff to make the trade, and the plaintiff, in the exercise of ordinary prudence, relying upon such representations as true, was induced to enter into the contract and was thereby defrauded, he is entitled to damages.

Upon competent evidence the referee has found that the defendant, knowing that the plaintiff was unacquainted with such goods as made up the stock in his store, both before the making of the written agreement and during the taking of the inventory, represented and stated to the plaintiff, in substance, that his stock was clean and desirable, and that the goods were of good styles and salable; that the plaintiff, relying upon the defendant's representations, did not make a careful examination of the goods, and did not avail himself of the means provided in the written agreement for fixing the prices of the goods; that the stock contained remnants of carpets, and both carpets and papers of old patterns and styles, which were not salable at the prices put upon them in the inventory, and nothing was said by the defendant to the plaintiff about this; and that the plaintiff relied upon the representations made by the defendant, and was deceived by them and by the suppression of facts relating to the stock. It is also to be assumed, from the finding of the referee for the plaintiff, that the defendant knew the representations were false, that they were made as statements of material facts to deceive the plaintiff and were not mere expressions of opinion, and that the plaintiff was justified in relying upon them. These questions of fact are included in the general finding. *Noyes v. Patrick*, 58 N. H. 618. If the representations were false, the defendant knew them

to be so, and the conclusion is almost irresistible that they were made with intent to deceive and defraud. Benj. Sales, s. 460.

It is objected that the plaintiff was not justified in relying upon the representations of the defendant, and that the referee erred in holding that the rule *caveat emptor* did not apply to this case. If the rule was of universal application, an action of deceit for false representations in a sale could never be maintained by the purchaser. It may be difficult to draw the line which separates cases within the rule from those to which it does not apply, as each case depends to some extent upon its peculiar circumstances; but it applies generally to cases free from actual fraud, where the parties deal upon an equal footing and with equal means of knowledge; and it is not applicable, as a general rule, where false and fraudulent representations of material facts are made by the vendor, and the parties have not equal facilities for ascertaining the truth. In such cases the purchaser has the right to rely upon the statements of the vendor; and when the purchaser is justified in relying upon the representations of the vendor, the rule *caveat emptor* does not apply.

Where the statements are of material facts, essentially connected with the substance of the transaction, and not mere general commendations or expressions of opinion, and are concerning matters which from their nature or situation are peculiarly within the knowledge of the vendor, the purchaser is justified in relying on them; and in the absence of any knowledge of his own, or of any facts which should excite suspicion, he is not bound to make inquiries and examine for himself. Under such circumstances it does not lie in the mouth of the vendor to complain that the vendee took him at his word. On the other hand, where the representations consist of general commendations or mere expressions of opinion, or where they relate to matters not peculiarly within the knowledge of the vendor, the purchaser is not justified in relying upon them, but is bound to examine for himself so as to ascertain the truth. 2 Pom. Eq. Juris., ss. 891, 892. In this case the parties were not on an equal footing, and had not equal means of knowledge. The defendant had an experience of fifteen years in trade, and knew the exact condition of his stock. The plaintiff had no acquaintance with such goods, and could learn nothing of their style and quality from an examination. The defects in the goods were to him undiscoverable defects. The representations made by the defendant related to material matters of fact, and the plaintiff was justified in relying on them. He was not guilty of negligence in assuming them to be true, nor was it his duty to employ a competent person to examine the goods.

In *Poland v. Brownell*, 131 Mass. 138, cited by the defendant in argument as a case strongly resembling the case at bar, it is stated in the opinion of the Court "that the evidence showed that the plaintiff relied on his own examination and the advice of a friend, and for all that appeared both buyer and seller had equal means of information, and were equally well qualified to judge of the value of the property."

The evidence that the plaintiff's vigilance was disarmed by the defendant's representations was admissible under the declaration. It is a necessary consequence of such representations to lull suspicion and prevent inquiry and examination, which is not required to be specially alleged. It is not necessary to make a special claim for damages which result naturally and necessarily from the fraud. 1 Ch. Pl. 395; 3 Suth. Dam. 426; *Hoitt v. Holcomb*, 23 N. H. 535, 552; *Hoitt v. Holcomb*, 32 N. H. 185, 205; *Page v. Parker*, 40 N. H. 47, 71. *Poland v. Brownell*, *supra*, and *Parker v. Moulton*, 114 Mass. 99, cited by the defendant, are to the effect that where the representations are not in themselves actionable, and the fact that the plaintiff was fraudulently induced to forego making inquiries which he would have otherwise made is relied on as a distinct ground of action, the means by which he was induced to forbear inquiry must be specifically set forth in the declaration, and it is not sufficient to charge in general terms that the plaintiff was fraudulently prevented by the defendant's artifice from making inquiry.

[Part of opinion omitted.]

It is objected that the plaintiff's sole remedy was provided by the contract, by the stipulation for a reference of all prices named on the stock by the defendant to the judgment of certain persons designated in the written agreement. That was one remedy, — but the contract did not exclude the plaintiff from the remedy of this action; and the same fraud that induced him to buy the goods, induced him to refrain from the remedy provided by the contract.

Judgment for plaintiff on the report.

SAVAGE v. STEVENS.

1879. 126 *Massachusetts*, 207.

TORT for false and fraudulent representations made by the defendant, whereby the plaintiff was induced to exchange an estate in Boston for an estate in Tamworth, New Hampshire.

At the trial in the Superior Court, before Rockwell, J., the plaintiff introduced evidence tending to show that the estate in Boston was valued at \$6000, subject to a mortgage of \$4000; that the defendant represented to the plaintiff that the estate in Tamworth was located only two and a half or three miles from Ossipee Centre, that it consisted of forty acres of land in a good state of cultivation, that there was a house built thereon within five or six years, and a good barn upon the land, that the taxes assessed for that year amounted to \$100, and that there was an insurance policy for \$1000 upon the house; that, before the exchange and delivery of the deeds, the defendant told the plaintiff that he had never seen the Tamworth estate, and referred

the plaintiff to three other persons, some of whom made substantially the same statement; that, after the deeds of exchange were passed, the plaintiff went for the first time to Tamworth, and found that the land was sterile, that there were no fences, that there was an old barn nearly gone, that the house was probably one hundred years old, and was greatly dilapidated, without whole windows or doors, and that the taxes were less than \$3, according to a tax bill admitted in evidence; that the defendant never produced any insurance policy, but said there was one for \$1000, but it was of no use to transfer it as it expired soon; and that the estate was situated eighteen miles from Ossipee Centre.

The judge directed a verdict for the defendant, on the ground that there was no evidence to sustain the action, because the plaintiff could have ascertained, by visiting the estate and by means accessible to him, what the truth was; there being no evidence that the defendant by any act or statement discouraged or prevented him from making full examination of every particular. The plaintiff alleged exceptions.

B. E. Perry & S. W. Creech, Jr., for the plaintiff.

W. P. Harding & A. V. Lynde, for the defendant, cited *Thom v. Bigland*, 8 Exch. 725; *Medbury v. Watson*, 6 Met. 246, 259; *Brown v. Castles*, 11 Cush. 350; *Gordon v. Parmelee*, 2 Allen, 212; *Hemmer v. Cooper*, 8 Allen, 334; *Mooney v. Miller*, 102 Mass. 217; *Tucker v. White*, 125 Mass. 344.

ENDICOTT, J. We are of opinion that this case should have been submitted to the jury. The representations made by the defendant in relation to the situation of the farm, and the condition and character of the buildings, were of material facts, affecting the value of the property, and were not expressions of opinion merely. Where a vendor makes such representations, as of his own knowledge, respecting the property he proposes to convey, and they are false, he is liable to the vendee who relies and acts upon the statements as true; and if not made as of his own knowledge, yet, if he knows them to be false, he is equally liable. It was therefore no conclusive answer in this case that the defendant had not seen the farm in New Hampshire. *Litchfield v. Hutchinson*, 117 Mass. 195. It is true that a person to whom such representations are made has no right to rely upon them, if the facts are within his observation, or if he has equal means of knowing the truth. But if the facts are not known to him, and he has not equal means of knowing the truth, and can rely upon the statements made to him without imputation of negligence, then, upon discovering them to be false and fraudulent, he may maintain an action. *Manning v. Albee*, 11 Allen, 520. In the case at bar, the farm respecting which the representations were made was situated in Tamworth, New Hampshire, far distant from the place of the bargain. No certain knowledge could be obtained by the plaintiff respecting it, except by visiting the estate. Negligence cannot be imputed to the plaintiff, as matter of law, in failing to visit a place so distant; and whether he was negligent, in fact, in not doing so was a question for the jury upon all the evidence in the case.

Exceptions sustained.

GORDON v. PARMELEE, ET ALS.

1861. 2 Allen, 212.¹

Two actions of contract, tried and argued together, on promissory notes given by the defendants in payment for a farm and a detached piece of woodland.

At the trial in the Superior Court, before Rockwell, J., it appeared that the bargain for the land was made upon the premises, and that the defendants had viewed the same with reference to the purchase, and passed over the wood lot at several times before the purchase, in different directions. The defendants offered to show that the treaty for the purchase was made when the land was covered with snow, and that the plaintiffs falsely represented that the farm was of a soil, and a capacity for productiveness and the keeping of stock, greatly superior to what it was in fact; and that they had no means of judging of the same except from the representations of the plaintiffs, on which they relied, and were thereby induced to make the purchase; but the evidence was excluded. They also offered to show that the wood lot was so rough and uneven that its actual extent could not be seen from any point, and that the plaintiffs falsely pointed out boundaries as the true ones which included lands of adjoining owners, and falsely represented that a portion thereof lying under a ledge, and so situated that no judgment as to its quantity approaching correctness could be formed by inspection, contained fifty acres, knowing that in fact it only contained twenty-eight acres. The defendants claimed a right to recoup in damages for all these false representations; but the Court ruled that they could recoup only for the value of the land lying between the boundaries pointed out and the true bounds, and not for false representations as to the number of acres, and if no false representations were made as to the boundaries, no deduction should be made from the notes.

Verdict for plaintiffs. Defendants excepted.

I. Sumner & H. L. Daves, for defendants.

J. E. Field, for plaintiffs.

BIGELOW, C. J. The alleged false statements concerning the productiveness of the land and its capacity to furnish support for cattle constituted no defence to the notes. They fall within that class of affirmations, which, although known by the party making them to be false, do not as between vendor and vendee afford any ground for a claim of damages either in an action on the case for deceit, or by way of recoupment in a suit to recover the purchase money. They come within the principle embodied in the maxim of the civil law, *simplex commendatio non obligat*. Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers

¹ Part of statement omitted; also citations of counsel. — Ed.

to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmations concerning the value of land, or its adaptation to a particular mode of culture, or the capacity of the soil to produce crops or support cattle, are, after all, only expressions of opinion or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters which are not peculiarly within the knowledge of the vendor, and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are, strictly speaking, *gratis dicta*. The vendee cannot safely place any confidence in them; and if he does, he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false as the basis of his claim for damages in reduction of the amount which he agreed to pay for the property.

The representations concerning the quantity of land which formed the subject of the contract come within the same principle. The vendors pointed out to the vendees the true boundaries of the land which they sold. This fact is established by the verdict of the jury under the instructions which were given at the trial. The defendants had therefore the means of ascertaining the precise quantity of land included within the boundaries. They omitted to measure it, or to cause it to be surveyed. By the use of ordinary vigilance and attention, they might have ascertained that the statement concerning the number of acres, on which they placed reliance, was false. They cannot now seek a remedy for placing confidence in affirmations which, at the time they were made, they had the means and opportunity to verify or disprove. *Sugd. on Vend.* 6, 7; *Scott v. Hanson*, 1 Sim. 13; *Medbury v. Watson*, 6 Met. 246; *Brown v. Castles*, 11 Cush. 348.

[Remainder of opinion omitted.]

Exceptions overruled.

COON v. ATWELL.

1866. 46 *New Hampshire*, 510.¹

THIS is an action on the case for deceit, by which the plaintiff was induced to purchase of the defendant a farm at a great price, by means of which he was defrauded.

There were three counts in the declaration, to all of which there was a demurrer and joinder.

In the first count the deceit alleged was the representation of the defendant, that the farm cut seventy-five tons of hay a year, and that

¹ Arguments omitted. — ED.

what hay was then on the farm was cut that year and was good seventy-five tons ; whereas, in fact, the farm did not cut more than thirty-five tons a year, and the hay shown as cut that year was not all so cut, but a large quantity was cut the year before ; all of which the defendant well knew.

In the second count, the deceit alleged was in the representation that the farm contained two hundred and fifty acres of land, when in truth and in fact, it contained a much less quantity, to wit, one hundred and seventy-five acres, which the defendant well knew.

In respect to the third count, no opinion was given, it having been amended, and it is, therefore, unnecessary to state it. It is stated and assumed that the farm was conveyed by a deed, and the price agreed upon, viz., \$3200, paid and secured by the plaintiff. The defendant also contended that parol evidence of the alleged representations was inadmissible.

Blodgett, for defendant.

Murray, for plaintiff.

BELLOWS, J. In support of the demurrer the defendant urges that the representations set forth are merely expressions of opinion, not amounting to a warranty, and also immaterial, and with common prudence the truth might have been ascertained.

The foundation of the action, however, is not a warranty, but the fraud and deceit of the defendant ; and we think that if in making sale of the farm he fraudulently represented that it cut seventy-five tons of hay a year, when he knew it did not, and the plaintiffs were thereby deceived and induced to buy the farm, and so were injured, the action may be maintained ; nor do we think it a case where it was folly or negligence in the plaintiffs to confide in such representations.

It is not at all like the mere expression of an opinion as to value, but is a statement of a fact that in general would be peculiarly within the knowledge of the vendor ; and to hold that it would be folly to confide in it, would greatly tend to impair all further fair dealing.

The case of *Knox v. Bartlett*, in Rockingham County, not long since, was of this character, and although severely contested, no exception of this kind was made.

We are also of the opinion that the second count discloses a good cause of action, it being a misrepresentation of the quantity of land.

The fact that the deed contained no warranty on these points is not material, for, as said before, the gist of the action is deceit, and not breach of contract.

In each of these counts there is alleged a false affirmation, known by the defendant to be false, and in relation to a material matter, and by which the plaintiffs were deceived and injured, and in such a case an action lies. Com. Dig. *Action upon the Case for a Deceit*, A. 8, where it is laid down that if a man sold land affirming the rent to be so much when it is not, an action lies, for the rent is certain, and lies within his own knowledge. So is *Risney v. Selby*, 1 Salk. 211 ; 2 Ld. Raym.

1118. So if he sold land, affirming that he had a good title when he knew he had no title. Com. Dig., *Ibid.* See, also, *Pasley v. Freeman*, 3 T. R. 51, for the general principles which govern this action. The case of *Dobell v. Stevens*, 3 B. & C. 623, is much in point as to the alleged representations in respect to the quantity of hay produced. There the vendor of a public house, pending the treaty, falsely represented the amount of porter and spirits sold by the month, and also the rate at which the taps and certain rooms were rented, and it was held that case for deceit would lie. See, also, 2 Smith's Leading Cases, 55; notes to *Pasley v. Freeman*; and also *Page v. Parker*, 40 N. H. 47. In *Monell & al. v. Colden*, 13 Johns. 395, it was held that case would lie against a vendor of land for representing falsely that a certain privilege was annexed to it, though it was not stated in the deed. It may be observed, also, that a form similar to the first and second counts is given in 2 Ch. Pl. 687. See also *Munroe v. Prichett*, 16 Ala. 785; 13 U. S. Dig. 168, sec. 2; *Whitney v. Allaire*, 1 Comstock, 306; *Clark v. Baird*, 7 Barb. S. Ct. Rep. 65; *Bostwick v. Lewis*, 1 Day's Rep. 250; and *Sanford v. Handy*, 23 Wend. 260.

As to the first and second counts, we are of the opinion that the demurrer was properly overruled; and we are also of the opinion, that, in this form of action, parol evidence of the false affirmations is admissible.

Case discharged.

STARKWEATHER v. BENJAMIN.

1875. 32 Michigan. 305.

ERROR to Macomb Circuit.

Hubbard & Crocker and *C. A. Kent*, for plaintiff in error.

J. B. Eldredge and *A. B. Maynard*, for defendant in error.

CAMPBELL, J. This action was brought to recover damages arising from alleged misrepresentations made by Starkweather to Benjamin concerning the quantity of land in a parcel purchased from Starkweather and others, for whom he acted, and which was bought by the acre.

The defence rested mainly on the ground that the purchaser saw the land, and was as able to judge of its size as Starkweather.

We do not think the doctrine that where both parties have equal means of judging there is no fraud applies to such a case. The maxim is equally valid, that one who dissuades another from inquiry and deceives him to his prejudice is responsible. It cannot be generally true that persons can judge of the contents of a parcel of land by the eye. When any approach to accuracy is needed, there must be measurement. When a positive assurance of the area of a parcel of land is made by the vendor to the vendee with the design of making the vendee believe it, that assurance is very material, and equivalent to an assur-

ance of measurement. In this case the testimony goes very far, and shows that the assertions and representations, which the jury must have found to be true, were of such a nature that if believed, as they were, a re-survey must have been an idle ceremony. They were calculated to deceive, and as the jury have found, they did deceive Benjamin, and he had a clear right of action for the fraud.

[Omitting remainder of opinion.]

Judgment affirmed.

ROBERTS v. FRENCH.

1891. 153 *Massachusetts*, 60.

CONTRACT for money had and received by the defendant to the plaintiff's use. Trial in the Superior Court, before Thompson, J., who ruled that the plaintiff was not entitled to recover, and, after a verdict for the defendant, reported the case for the determination of this Court. The facts appear in the opinion.

F. H. Pearl, for the plaintiff.

M. A. Pingree, for the defendant.

HOLMES, J. This is an action to recover two hundred dollars paid by the plaintiff as part payment of the price of a lot of land for which he made the highest bid at a sale by auction. The advertisements described the lot as containing about eleven thousand square feet, and as extending one hundred and thirty feet on the east. The plaintiff's evidence tended to show that at the sale one of the firm of auctioneers read the advertisement and said that the defendant's husband and himself had measured the land (as they had done), and that its dimensions were as stated in the posted bill, except as to the easterly line, which was only one hundred and seven feet long. The other auctioneer then proceeded to sell the property, and said that the easterly line was one hundred and seven feet long; that the lot contained about eleven thousand square feet, and that a warranty deed would be given. The sale took place on the premises; the plaintiff was familiar with them, and he understood that he was buying only the land enclosed by the fences. But, according to his evidence, he believed the statements of the auctioneers as to the length of the lines and the area, and made his bid relying upon them, and, we may fairly say by inference, being more or less induced by them to purchase. The easterly line in fact was only ninety-five and a half feet long; the other lines varied somewhat from the lengths given at the sale, and the contents were seven thousand seven hundred and sixty feet, being five hundred and sixty-five feet less than what they would have been if the length of the lines stated at the sale had been correct. The defendant has not offered a deed describing the premises as they were described by the auctioneer, but only a

deed describing them correctly. The Court below ruled that the action could not be maintained; and the plaintiff excepted.

On the foregoing evidence plainly the jury might have found that the auctioneer made a misstatement of fact as to the length of the easterly line, and also represented that he made the statement on the faith of his own senses, because, as he said, he and the defendant's husband (who, by the way, was also her agent, and was present and assenting to what the auctioneer said) had measured the line. In other words, the statement of the length was a statement, as of the party's own knowledge, of the kind which our decisions pronounce fraudulent. *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403. Notwithstanding the plaintiff's knowledge of how the land looked, the jury also might have found that the statement in fact deceived him, and induced him to buy, and that it materially varied from the truth. It is true that the agreement was to buy a lot with known boundaries, and very likely, in the absence of fraud, the rule would apply that monuments govern distances in such agreements and in deeds with warranty. *Noble v. Googins*, 99 Mass. 231; *Powell v. Clark*, 5 Mass. 355; Rawle on Covenants for Title (5th ed.), § 297. But that is only a rule of construction; it does not mean that measurements are not material, or that a man who knows the monuments cannot be deceived about them. See *Lewis v. Jewell*, 151 Mass. 345. Of course, it was not necessary that the plaintiff's belief as to the length should have furnished his only motive for buying, if it furnished one motive, *Safford v. Grout*, 120 Mass. 20, 25; *Windram v. French*, 151 Mass. 547; and if the defendant's agents knew that the representations would affect action on the part of the bidders, or if under the known circumstances it manifestly was likely to do so.

The ruling of the Court below probably assumed all that we have said, but was based on the cases which hold fraudulent representations as to the contents of a piece of land, the boundaries of which are pointed out to the buyer, not to be actionable. *Gordon v. Parmelee*, 2 Allen, 212; *Mooney v. Miller*, 102 Mass. 217.

We do not mean to question these decisions in the slightest degree, but it is obvious that there must be a limit beyond which fraudulent representations cannot be made with impunity; and upon the whole we are of opinion that, if the plaintiff's evidence is believed, the representations made to him, under the circumstances in which they were made, went beyond that limit. When a man conveys "the notion of actual admeasurement" (*Hill v. Buckley*, 17 Ves. 394, 401, cited 99 Mass. 233), still more, when he says that he has measured a line himself and has found it so long, his statement has a stronger tendency to induce the buyer to refrain from further inquiry (*Parker v. Moulton*, 114 Mass. 99, 100) than a statement of the contents of a lot without giving grounds for the estimate. If false, it is a grosser falsehood. It purports on its face to exclude the suggestion that it is a mere estimate, which the other leaves open. See *Cabot v. Christie*, 42 Vt. 121, 126;

Deming v. Darling, 148 Mass. 504, 505. If it is made at a sale by auction, where it is out of the question for a bidder to go and verify it before making his bid, it seems to us reasonable to say that the purchaser has a right to rely upon it, as was held in a very similar case in Connecticut. *Stevens v. Giddings*, 45 Conn. 507. See *Lewis v. Jewell*, 151 Mass. 345; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486, 489; *Porter v. Fletcher*, 25 Minn. 493.

New trial granted.

CHAPTER XII.

MERGER, OR SUSPENSION, OF CIVIL REMEDY IN CASE OF FELONY.

WELLOCK *v.* CONSTANTINE.1863. 2 *Hurlstone & Coltman*, 146.¹

POLLOCK, C. B. This was a motion to set aside a nonsuit and for a new trial. The cause was tried at York, before my Brother Willes; and it appearing to him, on the evidence of the plaintiff, who was a young woman, complaining of personal violence to herself, that there was evidence that a rape had been committed, he stopped the case and nonsuited the plaintiff.

The majority of the Court are of opinion that the rule should be discharged. The ground upon which the nonsuit proceeded was, that after it appeared that the civil wrong complained of, and for which a civil remedy was sought by the action, involved a charge of felony, the proper course was not to proceed with the trial, but to prosecute for the criminal offence.

My Brother Martin differs so far as to enable the parties, if they think fit, to take the case to a court of error. In speaking of the decision of the Court, I am stating the opinion I entertain together with my Brother Bramwell. My Brother Channell did not hear the whole of the argument, and therefore takes no part in the decision.

Rule discharged.

EX PARTE BALL. IN RE SHEPHERD.

1879. *Law Reports*, 10 *Chancery Division*, 667.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy. 9 Ch. D. 704.

J. D. Shepherd was a clerk in the employment of Messrs. Willis & Co., bankers. On the 16th of March, 1877, he absconded, and it was then discovered that he had embezzled moneys belonging to his employers to a large amount, which was ultimately ascertained to be

¹ Statement and arguments omitted. — Ed.

£7,852 19s. On the 26th of March the bankers applied for a warrant for the apprehension of Shepherd, and the warrant was issued on the 28th of March. The officer who was intrusted with the warrant was, however, unable to find him, and, so far as could be ascertained, he had left England before the warrant was issued. On the 4th of May, 1877, Shepherd was adjudicated a bankrupt in his absence by the Greenwich County Court. On the 26th of March, 1878, Willis & Co. tendered a proof in the bankruptcy for the £7,852 19s. On the 8th May, 1878, the trustee in the bankruptcy rejected the proof. Meanwhile Willis & Co. had filed a liquidation petition, and Mr. Turquand had been appointed trustee of their property. He applied to the County Court for an order that Shepherd's trustee should admit the proof. The Registrar, acting as Deputy Judge, affirmed the trustee's decision. Turquand appealed to the Chief Judge, who ordered the proof to be admitted, on the ground that it had not been shown that Willis & Co. had not done their best to bring Shepherd to justice. The substance of the evidence upon which the Chief Judge came to this conclusion is given in the report of the hearing by him (9 Ch. D. 706), and it is unnecessary now to repeat it.

Shepherd's trustee appealed.

De Gex, Q. C., and *H. F. Dickens* (*H. Winch* with them), for the appellant: Embezzlement by a clerk is a felony. 24 & 25 Vict. c. 96, s. 68. A debt arising out of a felonious act cannot be made the subject of a civil action or of proof in bankruptcy until the injured person has prosecuted the felon. *Ex parte Elliott*, 3 Mont. & A. 110; *Stone v. Marsh*, 6 B. & C. 551; *Marsh v. Keating*, 1 Bing. N. C. 198; *Robson's Bankruptcy* (3rd ed.), 205, 206. *Wells v. Abrahams*, Law Rep. 7 Q. B. 554, has not altered the law. It is simply a decision that where it appears from the evidence at the trial that the cause of action arises out of a felony for which the defendant has not been prosecuted, the judge is bound to try the issues on the record, and ought not to nonsuit the plaintiff. *Wellock v. Constantine*, 2 H. & C. 146; *Prosser v. Rowe*, 2 Car. & P. 421; *Hayes v. Smith*, Sm. & Bat. 378, are in direct conflict with that case.

[JAMES, L. J. Can a man plead his own felony in answer to an action; and, if not, is his trustee in bankruptcy in any better position?]

Ex parte Elliott shows that the trustee can take the objection; and *Ex parte Jones*, 2 Mont. & A. 193, and *Stone v. Marsh* are authorities to the same effect. *Markham v. Cobbe*, Noy, 82; *Lutterell v. Reynell*, 1 Mod. 282; *Dawkes v. Coveleigh*, Styles, 346; *Higgins v. Butcher*, Yelv. 89; *Cooper v. Witham*, 1 Lev. 247, are all authorities for the general proposition. *Lutterell v. Reynell* is the only case in which it was held that the felon could not plead the felony. But formerly it was thought that the civil remedy was merged; in more modern times it has been held that the civil remedy is only suspended until the felon has been prosecuted. If that be so, the felon in pleading the felony would not be taking advantage of his own wrong, and that destroys the

ratio decidendi of *Lutterell v. Reynell*. The only exceptions from the rule are where prosecution has become impossible, as for instance, by the death of the felon, or where he has been prosecuted for a similar offence by some other person. *Stone v. Marsh, supra*; *Crosby v. Leng*, 12 East, 409; *Wickham v. Gatrill*, 2 Sm. & Giff. 353; *Ex parte Jones, supra*; *Marsh v. Keating, supra*; *White v. Spettigue*, 13 M. & W. 603.

[BRAMWELL, L. J., referred to *Dudley and West Bromwich Banking Company v. Spittle*, 1 J. & H. 14; Addison on Torts, 4th ed. 31.

JAMES, L. J. If a plaintiff can prove his case without proving any illegality he can succeed; it is no answer for the defendant afterwards to prove an illegality. *In re South Wales Atlantic Steamship Company*, 2 Ch. D. 763.

Beaumont, amicus curiæ, referred to *Chowne v. Baylis*, 31 Beav. 351.]

Even if a man cannot plead his own felony, the judge who tries the case is bound to lay down the law correctly. *Owen v. Hurd*, 2 T. R. 643. The rule that there must be a prosecution before a civil action can be brought has been established in the interest of the public. If the plea is put in, the judge can stay the action until after prosecution.

[JAMES, L. J. Does the obligation to prosecute extend to any one but the injured person? Would it extend to his executors, and does it extend to his trustee in bankruptcy or liquidation?]

The representative must stand in the same position as the injured person himself; he must take the burden with the benefit. A trustee in bankruptcy or liquidation is the mere creature of statute, and can have no advantage which the bankrupt or debtor would not have had, unless it is expressly given to him by the statute. In this case Willis & Co. proved before they filed their liquidation petition.

[*Winslow*, Q. C., for the trustee of Willis & Co. They tendered the proof, but the application that it should be admitted was made by their trustee.]

At any rate, before he can bring an action, or sustain a proof in bankruptcy, the injured person is bound to show that he has done all that lies in his power to bring the felon to justice. *Gimson v. Woodfull*, 2 Car. & P. 41. Here the effect of the evidence is that Willis & Co. did not use due diligence in endeavoring to prosecute the bankrupt; indeed it shows that they actually connived at his escape.

On the whole, the proof ought not to be admitted, and the respondent ought not even to be allowed to enter a claim. The debt is not provable, and sect. 42 of the Bankruptcy Act does not apply.

At the conclusion of the argument for the appellant,

THE COURT (James, Baggallay, and Bramwell, L.JJ.) said that they would consider whether they would call on the counsel for the respondent.

In the result, *Winslow*, Q. C., and *Bush Cooper*, for the respondent, were not called upon.

March 6. BRAMWELL, L. J. In this case the debt which is sought to be proved arose from the felonious act of the bankrupt in embezzling the moneys of his employers. The question is, whether, that being so, and no more having been done than has been done towards prosecuting the bankrupt, the trustee in the liquidation of Messrs. Willis and Co., the employers, can prove for the debt in the bankruptcy. The law on this subject is in a remarkable state. For three hundred years it has been said in various ways by judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that which was, not so much expressed by Mr. Justice Blackburn in *Wells v. Abrahams, supra*, as to be inferred from what he said. But, though such an opinion has been entertained and expressed for all this time, there are but two cases in which it has operated to prevent the debt being enforced. These two cases are *Wellock v. Constantine, supra*, and *Ex parte Elliott, supra*. *Wellock v. Constantine* has been said to be no authority. If I may speak of myself, I have no doubt I concurred in the judgment, or the statement that I did so would have been set right, but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reasons given for the judgment, which I should have desired to give if I had thought there were any good ones to support it. But at all events there are the opinions of Chief Baron Pollock and Mr. Justice Willes, — opinions which no one who knew those judges will undervalue. Then there is the judgment in *Ex parte Elliott*, besides the expressed opinion for centuries that the felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible ways: 1. That no cause of action arises at all out of a felony; 2. That it does not arise till prosecution; 3. That it arises on the act, but is suspended till prosecution; 4. That there is neither defence to nor suspension of the claim by or at the instance of the felon debtor, but that the Court, of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these theories. That the first is not true is shown by *Marsh v. Keating, supra*, where it was held that, prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon, *plus* a prosecution. The cause of action would not arise till after both. Till then the Statute of Limitations would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt and the prosecution. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt and in cases

of compositions with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the Statute of Limitations to run? Suppose the debtor or his representative sue the creditor, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule, *nemo allegans suam turpitudinem est audiendus*. Besides, it would be absurd to suppose that the debtor himself ever would so plead and face the consequences. Then is the fourth solution right? Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Mr. Justice Blackburn did as a possibility. Is it left to the Court to find it out on the pleadings? If it appears on the trial, is the judge to discharge the jury? How is the Crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But again, suppose it can be, what is the result? It has been held that when the felon is executed for another felony the claim may be maintained. What is to happen when he dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party injured? All these cases create great difficulties to my mind in the application of this alleged law, and go a long way to justify Mr. Justice Blackburn's doubt. Still, after the continued expression of opinion and the cases of *Ex parte Elliott, supra*, and *Wellock v. Constantine, supra*, I should hesitate to say that there is no practical law as alleged by the respondent. It is not necessary for us to do so in this case, because, assuming that there is, and assuming that Messrs. Willis & Co. themselves could maintain no claim in this case until they had performed their duty (if it can be said there is any) to prosecute, we are of opinion that there is no such duty in the respondent, who represents, not them, but their creditors; that the debt is due at and from the time of the act causing it; that the disability to sue or liability to have proceedings stayed, if any, is personal to him in whom is the duty, and, consequently, that this claim may be maintained. Whether that would be so if the assignment of the debt was purely voluntary and not under the Bankruptcy Act, I do not say. I may further add that I doubt much if Messrs. Willis & Co. themselves would not be entitled to prove, otherwise the estate of the bankrupt might be distributed and injustice done. If it should be said in answer to this that a claim could be entered, the claimant must be admitted to be heard, even before he can make a claim, and his claim would not prevent the distribution of the assets as they are got in among the creditors who have actually proved, unless some were set aside especially to provide for it, which would be a strange anomaly if principle be a true one. In *Ex parte Elliott, supra*, neither proof nor claim was admitted.

JAMES, L. J. The judgment which Lord Justice Bramwell has just read expresses my opinion as well as his.

BAGGALLAY, L. J. I agree with my colleagues in thinking that the appeal in this case should be dismissed, but I prefer to rest my decision upon the same grounds as those assigned by the Chief Judge. It appears to me that the following propositions are affirmed by the authorities, many of which, however, are *dicta* or enunciations of principle rather than decisions: 1, that a felonious act may give rise to a maintainable action; 2, that the cause of action arises upon the commission of the offence; 3, that, notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavoring to bring the felon to justice; 4, that this rule has no application to cases in which the offender has been brought to justice at the instance of some other person injured by a similar offence, as in *Marsh v. Keating*, *supra*, or in which prosecution is impossible by reason of the death of the offender, or of his escape from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence; 5, that the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect the seeking of civil redress by action. It is unnecessary to refer to the authorities by which these propositions have been affirmed; the whole subject is fully discussed and the leading decisions commented upon in *Ex parte Elliott*, *supra*; *Wellock v. Constantine*, *supra*; and *Wells v. Abrahams*, *supra*. I think, also, that neither the executors or administrators of the person injured by the felony, nor his trustee in bankruptcy, can be in any better position than he himself was in at the date of his death or of the commencement of his bankruptcy; and, if at such period prosecution of the offender had, by want of due diligence on his part, become impossible, and he had thereby been debarred from seeking civil redress, his estate must bear the consequences. The question then remains whether prosecution in the present case had been rendered impossible by reason of any want of due diligence on the part of Messrs. Willis & Co.; and upon this point I agree with the Chief Judge in thinking that there was no default on their part sufficient to have deprived them of a right to prove had they continued solvent.

The appeal was accordingly dismissed with costs.

De Gex asked for leave to appeal to the House of Lords.

Winslow opposed the application.

JAMES, L. J. A grave question of principle is involved, and personally I should be very glad that the matter should be discussed in the House of Lords.

BRAMWELL, L. J., concurred.

Leave was accordingly given, on the terms of the petition of appeal being presented within a month.

JAMES, L. J. I wish to say this, that if it were necessary to decide the point, I should require to hear a great deal more to satisfy me that Messrs. Willis & Co. used due diligence in endeavoring to prosecute the bankrupt.

BRAMWELL, L. J. I desire to add that I am not sure the law, if there is any on this subject, may not turn out to be this, that if the felon goes abroad and so a prosecution becomes impossible, that is the misfortune of the creditor, and he must wait till the felon comes back again.

BOSTON AND WORCESTER RAILROAD CORPORATION v.
DANA.

1854. 1 *Gray*, 83.¹

BIGELOW, J. The main objection raised by the defendant in the present case which, if well maintained, is fatal to the plaintiff's action, presents an interesting and important question, hitherto undetermined by any authoritative judgment in the Courts of this Commonwealth.

The plaintiffs seek to recover in an action of assumpsit a large sum of money alleged by them to have been fraudulently abstracted from their ticket-office by the defendant while he was in their employment as depot-master, having charge of their principal railway-station in Boston. In regard to this item of the plaintiffs' claim, the defendant contended at the trial, and requested the judge who presided to instruct the jury, that the plaintiffs were not entitled to recover in this action the money thus taken by the defendant, because their cause of action, if any they had, was suspended until an indictment had been found or complaint made against the defendant for larceny. This request was refused, and the jury were instructed that if the defendant had fraudulently taken and appropriated the plaintiffs' money in the manner alleged, and was thereby guilty of larceny, he would be liable in the present action, although no criminal prosecution had first been instituted therefor. It is upon the correctness of this instruction that the first and main question in the case arises.

The doctrine that all civil remedies in favor of a party injured by a felony are, as it is said in the earlier authorities, merged in the higher offence against society and public justice, or, according to more recent cases, suspended until after the termination of a criminal prosecution against the offender, is the well-settled rule of law in England at this day, and seems to have had its origin there at a period long anterior to the settlement of this country by our English ancestors. *Markham v. Cob*, Latch, 144, and *Noy*, 82; *Dawkes v. Coveleigh*, Style, 346; *Cooper v. Witham*, 1 Sid. 375, and 1 Lev. 247; *Crosby v. Leng*, 12 East, 413; *White v. Spettigue*, 13 M. & W. 603; 1 Chit. Crim. Law, 5.

But although thus recognized and established as a rule of law in the parent country, it does not appear to have been, in the language of our

¹ Statement and argument omitted. Only so much of the opinion is given as relates to one point. — ED.

Constitution, "adopted, used, and approved in the province, colony, or State of Massachusetts Bay, and usually practised on in the Courts of law." The only recorded trace of its recognition in this Commonwealth is found in a note to the case of *Higgins v. Butcher*, Yelv. (Amer. ed), 90 a, note 2, by which it appears to have been adopted in a case at *nisi prius* by the late Chief-Justice Sewall. The opinion of that learned judge, thus expressed, would certainly be entitled to very great weight if it were not for the opinion of this Court in *Boardman v. Gore*, 15 Mass. 338, in which it is strongly intimated, though not distinctly decided, that the rule had never been recognized in this State, and had no solid foundation, under our laws, in wisdom or sound policy. Under these circumstances we feel at liberty to regard its adoption or rejection as an open question, to be determined, not so much by authority as by a consideration of the origin of the rule, the reasons on which it is founded, and its adaptation to our system of jurisprudence.

The source whence the doctrine took its rise in England is well known. By the ancient common law felony was punished by the death of the criminal and the forfeiture of all his lands and goods to the Crown. Inasmuch as an action at law against a person whose body could not be taken in execution and whose property and effects belonged to the king, would be a useless and fruitless remedy, it was held to be merged in the public offence. Besides, no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore a party injured by a felony could originally obtain no recompense out of the estate of a felon, nor even the restitution of his own property, except after a conviction of the offender by a proceeding called an appeal of felony, which was long disused, and wholly abolished by St. 59 Geo. III. c. 46; or under St. 21 Hen. VIII. c. 11, by which the judges were empowered to grant writs of restitution if the felon was convicted on the evidence of the party injured or of others by his procurement. 2 Car. & P. 43, note. But these incidents of felony, if they ever existed in this State, were discontinued at a very early period in our colonial history. Forfeiture of lands or goods on conviction of crime was rarely, if ever, exacted here, and in many cases deemed in England to be felonies and punishable with death, a much milder penalty was inflicted by our laws. Consequently the remedies to which a party injured was entitled in cases of felony were never introduced into our jurisprudence. No one has ever heard of an appeal of felony or a writ of restitution under St. 21 Hen. VIII. c. 11, in our courts. So far, therefore, as we know the origin of the rule and the reasons on which it was founded, it would seem very clear that it was never adopted here as part of our common law.

Without regard, however, to the causes which originated the doctrine, it has been urged with great force and by high authority that the rule now rests on public policy; 12 East, 413, 414; that the interests of

society require, in order to secure the effectual prosecutions of offenders by persons injured, that they should not be permitted to redress their private wrongs until public justice has been first satisfied by the conviction of felons; that in this way a strong incentive is furnished to the individual to discharge a public duty by bringing his private interest in aid of its performance, which would be wholly lost if he were allowed to pursue his remedy before the prosecution and termination of a criminal proceeding. This argument is doubtless entitled to great weight in England, where the mode of prosecuting criminal offences is very different from that adopted with us. It is there the especial duty of every one against whose person or property a crime has been committed to trace out the offender and prosecute him to conviction. In the discharge of this duty he is often compelled to employ counsel, procure an indictment to be drawn and laid before the grand jury, with the evidence in its support; and if a bill is found, to see that the case on the part of the prosecution is properly conducted before the jury of trials. All this is to be done by the prosecutor at his own cost, unless the Court, after the trial, shall deem reimbursement reasonable. 1 Chit. Crim. Law, 9, 825. The whole system of the administration of criminal justice in England is thus made to depend very much upon the vigilance and efforts of private individuals. There is no public officer appointed by law in each county, as in this Commonwealth, to act in behalf of the government in such cases, and take charge of the prosecution, trial, and conviction of offenders against the laws. It is quite obvious that, to render such a system efficacious, it is essential to use means to secure the aid and co-operation of those injured by the commission of crimes, which are not requisite with us. It is to this cause that the rule in question, as well as many other legal enactments designed to enforce upon individuals the duty of prosecuting offences, owes its existence in England. But it is hardly possible, under our laws, that any grave offence of the class designated as felonies can escape detection and punishment. The officers of the law, whose province it is to prosecute criminals, require no assistance from persons injured other than that which a sense of duty, unaided by private interest, would naturally prompt.

On the other hand, in the absence of any reasons, founded on public policy, requiring the recognition of the rule, the expediency of its adoption may well be doubted. If a party is compelled to await the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon. Nor can it contribute to the purity of the administration of justice, or tend to promote private morality, to suffer a party to set up and maintain in a court of law a defence founded solely upon his own criminal act. The right of every citizen, under our Constitution, to obtain justice promptly and without delay requires that no one should be delayed in obtaining a remedy for a private injury, except in a case of the plainest public necessity. There being no such

necessity calling for the adoption of the rule under consideration, we are of opinion that it ought not to be engrafted into our jurisprudence.

We are strengthened in this conclusion by the weight of American authority, and by the fact that in some of the States where the rule had been established by decisions of the Courts it has been abrogated by legislative enactments. *Pettingill v. Rideout*, 6 N. H. 454; *Cross v. Guthery*, 2 Root, 90; *Piscataqua Bank v. Turnley*, 1 Miles, 312; *Foster v. Commonwealth*, 8 W. & S. 77; *Patton v. Freeman*, Coxe, 113; *Hepburn's Case*, 3 Bland, 114; *Allison v. Farmers' Bank of Virginia*, 6 Rand. 223; *White v. Fort*, 3 Hawks, 251; *Robinson v. Culp*, 1 Const. Rep. 231; *Story v. Hammond*, 4 Ohio, 376; *Ballew v. Alexander*, 6 Humph. 433; *Blossingame v. Graves*, 6 B. Monr. 38; Rev. Sts. of N. Y. Part 3, c. 4, § 2; St. of Maine of 1844, c. 102.

[Opinion on other points omitted.]

Judgment on the verdict.

CHAPTER XIII.

WHETHER ACTION LIES AT COMMON LAW FOR
CAUSING DEATH.

BAKER v. BOLTON.

1808. 1 *Campbell*, 493.

THIS was an action against the defendants as proprietors of a stage coach, on the top of which the plaintiff and his late wife were travelling from Portsmouth to London, when it was overturned; whereby the plaintiff himself was much bruised, and his wife was so severely hurt that she died about a month after in a hospital. The declaration, besides other special damage, stated, that “by means of the premises, the plaintiff had wholly lost, and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind.”

It appeared that the plaintiff was much attached to his deceased wife, and that, being a publican, she had been of great use to him in conducting his business. But,

LORD ELLENBOROUGH said, the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife’s society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff’s wife must stop with the period of her existence.

Verdict for the plaintiff, with £100 damages.

Park and *Marryat*, for the plaintiff.

The *Attorney-General*, for the defendant.

Q. If the wife be killed on the spot, is this to be considered *damnum absque injuria*.—
REPORTER.

CAREY AND WIFE v. BERKSHIRE R. R. CO.
SKINNER v. HOUSATONIC R. R. CO.1848. 1 *Cushing*, 475.¹

THE first of the above named actions was originally commenced by Eliza Ann Hewins, then the widow of Joseph H. Hewins, and is now prosecuted in the joint names of herself and Lockwood Carey, with whom she has since intermarried. It was an action on the case, to recover damages for the loss of the life of the female plaintiff's late husband, in consequence of the negligence, carelessness, and unskillfulness of the defendants' servants and agents.

Plaintiffs offered to prove that Hewins, the former husband of the female plaintiff, was fatally hurt by the negligence of the defendants' servants, and died of his injuries in eighteen or twenty hours afterwards.

The judge being of opinion, that if the facts stated were proved, they would not entitle the plaintiff to recover, a verdict was thereupon rendered for the defendants, and the plaintiff filed exceptions.

H. W. Bishop, for the plaintiffs.

I. Sumner, for the defendants.

The second of the above named actions was also an action on the case, brought by the plaintiff for the loss of service of his son, aged about eleven years, who was killed by the cars of the defendants on the 24th day of February, 1847.

At the trial, which was in this Court, before *Dewey, J.*, the plaintiff proposed to prove, in order to entitle himself to a verdict, that the death of his son was caused by an accident which took place on the defendants' railroad, by reason of the carelessness or fault of the servants and agents of the defendants.

The case was taken from the jury, by consent, and reserved for the consideration of the whole Court, upon the report of the judge.

J. Rockwell & H. Wheeler, for the plaintiff.

I. Sumner, for the defendants.

These cases were separately argued, but, presenting a single question only, for the consideration of the Court, they were both embraced in the same opinion.

METCALF, J. These actions raise a new question in our jurisprudence. No case was cited, at the argument, in which a like action had been the subject of adjudication, or even of discussion. The case of *Huggins v. Butcher*, 1 Brownl. 205, and Yelv. 89, was referred to, where there is a *dictum* of Tanfield, J., in which Fenner and Yelverton, JJ., are said to have concurred, that "if one beat the servant of J. S. so that he die of that beating, the master shall not have an action against the other, for the battery and loss of service, because the servant dying of the extremity of the beating, it is now become

¹ Statement abridged. — ED.

an offence against the Crown, and turned into felony, and this hath drowned the particular offence, and prevails over the wrong done to the master, and his action by that is gone." This doctrine is also found in most of the digests and abridgments of the English law. But whatever may be the meaning or legal effect of the maxim, that a trespass is merged in a felony, it has no application to the cases now before us. In neither of them was the killing felonious, and there is, therefore, no felony, in which a private injury can merge.

If these actions, or either of them, can be maintained, it must be upon some established principle of the common law. And we might expect to find that principle applied in some adjudged case in the English books; as occasions for its application must have arisen in very many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel; and we cannot find any. This is very strong evidence, though not conclusive, that such actions cannot be supported. But it is not necessary to rely entirely on this negative evidence. For we find it adjudged, in *Baker v. Bolton & others*, 1 Campb. 493, that the death of a human being is not the ground of an action for damages. In that case, the plaintiff brought an action against the proprietors of a stage coach, which was overturned while he and his wife were travelling in it, whereby he was much bruised, and his wife so severely hurt, that she died about a month after. The declaration alleged, besides other special damage, that "by means of the premises, the plaintiff had wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind." Lord Ellenborough held, that the jury could take into consideration only the bruises which the plaintiff had sustained, and the loss of his wife's society; and the distress of mind he had suffered on her account, from the time of the accident to the time of her death. And he announced the principle of his decision, in these words: "In a civil court, the death of a human being cannot be complained of as an injury." Such, then, we cannot doubt, is the doctrine of the common law; and it is decisive against the maintenance of these actions.

We are aware of the case of *Ford v. Monroe*, 20 Wend. 210, in which the plaintiff, in an action tried before Cowen, J., recovered damages for the negligence of the defendant's servant, in driving a carriage over the plaintiff's son, ten years old, and thereby killing him. One ground of damage, alleged in the declaration, was the loss of the son's service for the period of eleven years; and the jury were instructed, that the plaintiff was entitled to recover such sum as the service of the son would have been worth, until he became twenty-one years of age. The case went before the whole Court on a motion for a new trial; but no question was there raised concerning the legal right of the plaintiff to recover damages caused by the killing of his

son. For aught that appears in the report, that point was assumed, and passed *sub silentio*, both at the trial and in bank.

The English parliament, by a very recent statute. (9 and 10 Vict. c. 93), have provided, that whenever the death of a person shall be caused by a wrongful act, neglect or default, which would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, the person, who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured shall have been caused under such circumstances as amount in law to felony; such action to be brought within twelve calendar months after such death, by and in the name of the executor or administrator of the person deceased, and to be for the benefit of the wife, husband, parent, and child of the persons whose death shall have been so caused; and in such action the jury may give such damages as they may think proportioned to the injury, resulting from such death, to the parties, respectively, for whose use such action shall be brought. And by our St. of 1840, c. 80, if the life of any passenger shall be lost by the negligence or carelessness of the proprietors of a railroad, steamboat, stage coach, &c., or of their servants or agents, such proprietors shall be liable to a fine, not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs.¹

These statutes are framed on different principles, and for different ends. The English statute gives damages, as such, and proportioned to the injury, to the husband or wife, parents and children, of any person whose death is caused by the wrongful act, neglect, or default of another person; adopting, to this extent, the principle on which it has been attempted to support the present actions. Our statute is confined to the death of passengers carried by certain enumerated modes of conveyance. A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the Commonwealth.

We believe that by the civil law, and by the law of France and of Scotland, these actions might be maintained. If such a law would be expedient for us, it is for the legislature to make it.

In the first of these actions, the exceptions are overruled; in the second, the plaintiff is to be nonsuit.

¹ As to statutes giving an action for causing death by wrongful act, and as to the judicial construction of such statutes, see Cooley on Torts, 2d edition, 307-324.—Ed.

WAITE, C. J., IN THE HARRISBURG.

1886. 119 *United States*, 212-214.

It is no doubt true that the Scotch law "takes cognizance of the loss and suffering of the family of a person killed," and gives a right of action therefor under some circumstances. Bell's Prin. Laws of Scot. (7th ed.), p. 934, § 2029; *Cadell v. Black*, 5 Paton, 567; *Weems v. Mathieson*, 4 Macqueen, 215. Such also is the law of France. 28 Merlin, Répertoire, 442, *verbo* Réparation Civile, § iv.; *Rolland v. Gosse*, 19 Sirey (Cour de Cassation), 269. It is said also that such was the civil law, but this is denied by the Supreme Court of Louisiana in *Hubgh v. The New Orleans & Carrollton Railroad*, 6 La. Ann. 495; s. c. 54 Am. Dec. 565, where Chief Justice Eustis considers the subject in an elaborate opinion after full argument. A reargument of the same question was allowed in *Hermann v. New Orleans & Carrollton Railroad*, 11 La. Ann. 5, and the same conclusion reached after another full argument. See also Grueber's Lex Aquilia, 17. But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. It is not mentioned in the laws of Oleron, of Wisbuy, or of the Hanse Towns, 1 Pet. Adm. Dec. Appx.; nor in the Marine Ordinance of Louis XIV., 2 Pet. Adm. Dec. Appx.; and the understanding of the leading text-writers in this country has been that no such action will lie in the absence of a statute, giving a remedy at law for the wrong. Benedict Adm. (2nd ed.), § 309; 2 Parsons' Ship. & Adm. 350; Henry, Adm. Jur. 74. The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common-law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to "natural equity and the general principles of law." Since, however, it is now established [*Insurance Co. v. Brame*, 95 U. S. 756] that in the Courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the Courts of admiralty from those which govern Courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the Courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of Courts to declare the law, not to make it, we cannot change this rule.

CHRISTIANCY, J., IN HYATT v. ADAMS.

1867. 16 *Michigan*, 189-193.

BUT as none of the reasons already mentioned have seemed satisfactory for the common-law rule (prohibiting an action for the death of a human being, or for the injury which caused it, whichever may be found to be the extent of the rule), another reason has been assigned which would undoubtedly have been a sound and sufficient reason so far as it extends. This is the common-law maxim: "*actio personalis moritur cum persona.*" See per Bacon, J., in *Green v. Hudson River R. R. Co.*, 28 Barb. 9.

This would furnish an adequate reason why no action could be brought by personal representatives, or others, for such damages as the deceased might have recovered for the injury, if death had not ensued, as the action for such damages would not survive. But this reason could have no application whatever to an action brought by a master for loss of service of his apprentice, or by a husband for those of his wife; since in these cases the cause of action could never have been vested in the servant or the wife, and could not be lost by the death. There can, therefore, be no such question of survivorship in an action like the present.

And if this were the true reason of the rule, there would be no reason why the master or the husband should not be allowed to recover damages for the loss of service after, as well as before the death of the wife or apprentice.

So far as I have been able to discover, there is but one English case which expressly holds that at common law an action for the loss of services of a wife killed by the wrongful act or negligence of the defendant can be maintained even for the loss of services up to the time of the death, or which intimates any distinction between the damages accruing before and after the death. This is the *nisi prius* case of *Baker v. Bolton*, before Lord Ellenborough in 1807. The case is very briefly reported; the form of action is not stated. It was an action against the defendants as proprietors of a stage coach, on the top of which the plaintiff and his wife were travelling, when it was overturned, whereby the plaintiff himself was much bruised, and his wife so severely hurt that she died about a month after. The declaration, besides other special damages, claimed damages for the loss of the comfort, fellowship, and assistance of his wife. Lord Ellenborough told the jury "they could only take into consideration the bruises which the plaintiff himself had sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account from the time of the accident to the moment of her dissolution." "In a civil court the death of a human being could not be complained of as an injury, and the damages as to the plaintiff's wife must stop with the period of her

existence." No authority is cited, no reason given, nor anything showing the cause of the accident or the degree of negligence; yet the assertion that "in a civil court the death of a human being cannot be complained of as an injury," seems to be now universally admitted both in England and in this country as the settled rule of the common law. The case of *Ford v. Monroe*, 20 Wend. 210 (the only one, so far as I am aware, holding a contrary doctrine), being very generally admitted not to be law. See per Metcalf, J., 1 Cush. 478-479. The action (in *Baker v. Bolton*) being against the proprietors, it is not at all probable that the death had been caused in a manner which would render them guilty of felony, and if the driver was thus guilty (which is not likely), this would not merge, or even suspend the action against the proprietors. *Gibson v. Minet*, 1 H. Black. 612; *White v. Spettigue*, 13 M. & W. 603. It is quite evident, therefore, I think, that Lord Ellenborough, in announcing the rule, must have rested it upon some other ground than any of those already discussed, — upon some ground wholly irrespective of the question whether the killing was felonious or not, and as the action was by the husband for the damages he had suffered, there could have been no question of survivorship. As no reason is given, and the previous decisions, so far as I have been able to discover, are silent as to any reason for the rule where the means of the death were not felonious, we are left somewhat to conjecture, for the reason of a rule admitted to be a settled rule of the common law, as well when the killing is not felonious as when it is.

For myself, I think — and the form of expression in which the principle is announced by Lord Ellenborough would indicate that such was his opinion — that the reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations, to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard, — a repugnance which seems to have been strong and prevalent among nations in proportion as they have been or become more enlightened and refined, and especially so where the Christian religion has exercised its most beneficent influence, and where human life has been held most sacred. Among barbarous and half civilized nations it has been common to find a fixed and prescribed standard of value or compensation for human life, which is often found to be carefully graduated by the relative importance of the position in the social scale which the deceased may have occupied. While this has been the natural result, it has at the same time been, to some extent, the cause of their inhuman customs, their barbarous manners, and social degradation, and of the comparatively low estimate in which human life has been held among them.

To the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting; and it can only become reconciled to such an idea by the strong necessity which has grown out of the new modes of travel and business in modern times, by which great numbers are

compelled to trust their lives to the skill and vigilance of the servants of corporations, and others in similar positions of responsibility, — a state of things which seemed to call for a remedy which should make railroad corporations, steamboat managers, and parties to whom others are compelled to trust for safety, more sensible of their responsibilities, and more careful to secure a high degree of vigilance in protecting the lives entrusted to their care, and at the same time afford relief for cases of great individual hardship, which might otherwise be suffered by those dependent upon the person whose life may be lost. Statutes of this kind have been passed in England and in many of the States of the Union, which may prove beneficial in the way above suggested. But there is still some reason to fear that, like many other human laws, their good effects will be found not unmixed with some incidental evils. The greatest caution has been, and will continue to be required on the part of Courts, to prevent the best and most benevolent feelings of our nature from clouding the judgments of jurors and prompting them to most intemperate verdicts, in the vain endeavor to give a money compensation for that which, in its very nature, is incapable of valuation by any such standard. And it will be fortunate in the future if it shall be found that habituating the public mind to the idea of pecuniary compensation for human life has not tended to weaken its safeguards, and to render it less sacred in the popular estimation.

This natural repugnance to which I have alluded, if not the original reason of the rule in question, would at least, in my opinion, have been a much better and sounder reason than the reasons which have been given in the cases, or than any consideration connected with the public offence, its grade, or its prosecution ; and would at the same time afford an equally satisfactory reason for denying the action for the death or damages resulting from it in cases not felonious, where it seems to be equally established.

And I am by no means satisfied that this is not the only sound and satisfactory basis upon which the common-law rule could have been sustained in England in modern times.

Based upon this ground the rule would not prevent an action for damages accruing to a party other than the person injured, up to the time of the death, though caused by the act or negligence which produced it ; while it would exclude all which might have accrued in consequence of the death. Such seems to have been Lord Ellenborough's understanding of the effect of the rule, as applied by him in *Baker v. Bolton*.

From the best examination I have been able to make of the English authorities, I think it is at least very questionable whether, for more than a century past, there has been any recognized legal principle which would have prevented the recovery of damages in such a case accruing prior to the death, to parties other than the deceased. If there has been any such obstacle, it must have been the doctrine of suspension of the remedy in cases of felony until trial of the offence, which still goes by the old name of merger in the felony.

EXTRACT FROM DISSENTING OPINION OF BRAMWELL, B., IN
OSBORN v. GILLETT.

1873. *Law Reports*, 8 *Exchequer*, 93-99.

THE declaration shows that the deceased was the plaintiff's servant, that by a wrongful act, for which the defendant is responsible, she was wounded and killed, and that thereby the plaintiff lost her services and sustained damage which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise. The plea admits all this, but says that the wrongful act and death of the servant were at the same moment of time. On this plea it is not alleged that the killing was manslaughter, and as against the defendant it must be taken it was not, for it is not alleged, and there may be a killing under circumstances of sufficient negligence to maintain an action if death had not ensued, though the negligence is not criminal so as to render the killing manslaughter.

Now, these pleadings show a state of things such that if the loss of service had arisen from the servant being injured, maimed, crippled, or otherwise disabled from work, but not killed, the action would be maintainable (see *Hodsoll v. Stallybrass*, 11 A. & E. 301), and the only question is, whether the loss arising from a killing makes any difference. It is important to bear this in mind, as it gets rid of all the suggested difficulties about the impolicy of such action being maintainable, and about the unreasonableness of its being maintainable when an annuitant for a man's life could not maintain an action for the wrongful killing of the *cestui que vie*. Because, supposing we could entertain such a consideration, this action is no more against good policy than one would be where the servant was crippled but not killed; and in the supposed case of the annuitant he could maintain no action for a wrongful crippling or disabling of the *cestui que vie*, whereby he could not pay the annuity, which, indeed, might have been granted to last during good health. Here a relation is shown to exist between the plaintiff and the servant in respect of which, if the master sustains damage in consequence of a wrongful act which injures the servant, the law gives the master a right of action, and the only question is, whether to that general rule there is an exception where the servant is killed. I asked why there should be; no reason was or could be given, except the supposed impolicy; but it was said to be a positive rule of law that where a damage was caused by death no action lay. The burden of showing this is on the defendant, who asserts it. He has to make out an exception to a general rule, and as no reason can be given for it, it seems to me to require very clear authority.

Mr. Prentice, for the defendant, relied, first, on the general rule or maxim, "*actio personalis moritur cum persona*." But that clearly means, dies with the person who was to be party to the action as plaintiff or defendant. Dies with the person. What person? It is not any

person or every person. If the servant here had lived six months, and during that period service had been lost, this action would clearly be maintainable, though she then died. Further, the maxim is "*actio moritur*," which supposes it was once alive, but here the argument is that the plaintiff never had any action. In effect the plaintiff's case is, "You killed my servant and caused me loss;" and the defendant's case is the same, "I did kill her, and therefore never was liable." The sense in which I say the maxim is to be understood is that put on it by Mr. Broom and the many authorities he cites in his *Maxims* (5th ed. p. 904).

The next authority relied on was *Baker v. Bolton*, 1 Camp. 493. Now, certainly, as reported, it favors the defendant's view, for Lord Ellenborough is reported to have said that "in a civil court the death of a human being could not be complained of as an injury, and in this case the damages as to the plaintiff's wife must stop with the period of her existence." The report is very short, and I am by no means sure of its accuracy. For though the evidence is that the wife assisted in the plaintiff's business, the special damage alleged does not contain any damage to the plaintiff's business, and Lord Ellenborough is reported to have said that the jury could only take into consideration the plaintiff's hurts and the loss of his wife's society, and distress of mind till the moment of dissolution. But why was not the plaintiff entitled to recovery for the loss of a month's assistance, and how was he entitled to recover for distress of mind at all? and especially why up to the time when that distress must have become greatest by the death? This is only a *nisi prius* case; the plaintiff got £100, and probably was content. No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument. The reporter puts a most significant query.¹ — Why should the answer to it be "Yes," as the defendant contends?

The remaining authorities are American, not binding on us indeed, but entitled to respect as the opinions of professors of English law, and entitled to respect according to the position of those professors and the reasons they gave for their opinions. The first case in date is in 1 Cush. 475, a case in the Supreme Court of Massachusetts. In one of the cases there reported, *Skinner v. Housatonic Ry. Corp.*, an action was brought by a father to recover damages for the loss of his son's service, killed by the negligence of the defendants by an act not felonious. In the other case, *Carey and Wife v. Berkshire Ry. Co.*, an action was brought by a widow to recover damages for the death of her husband, killed in like way. It seems strange that the two cases are supposed to present a single question only for the Court,

¹ *Quære*. If the wife be killed on the spot, is this to be considered *damnum absque injuria*, 1 Camp. at p. 494.

while it is obvious that the case of master and servant raises a different question from that of wife and husband. Nor do I understand why the plaintiff in the father's case, unless there was no damage to the father as master, was nonsuited. That looks as though he had not proved some fact; possibly he had not proved damage, for the child was eleven years old only, and it is nowhere said there was any damage. If so, the decision is right. But the judgment is, "If these actions, or either of them, can be maintained, it must be on some established principle of the common law." Now, that is true, and the principle is *injuria* and *damnum*, for which the defendant is responsible. The judgment proceeds, "and we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel and we cannot find any. This is very strong evidence that such actions cannot be supported." With great respect, the error of this reasoning is in supposing the burden of proof or argument is on the plaintiff. The general principle is in his favor, that *injuria* and *damnum* give a cause of action. It is for the defendant to show an exception to this rule when the *injuria* causes death. If the case had been viewed in this way, the reasons of the Court tell for the plaintiff. For in my judgment the exception is not upon any established principle of the common law; it is not applied in any adjudged case in the English books; it is not stated in any elementary treatise. They then cited and relied on *Baker v. Bolton*, 1 Camp. 493, on which I have commented. They then cite a case in which the contrary was assumed to be the law by all parties and the Court; but suppose it may have passed *sub silentio*. I cannot be satisfied with this decision. The reasoning seems wrong and the authority relied on insufficient.

The other case, *Eden v. Lexington & Frankfort Ry. Co.*, 14 B. Mon. 204, is in the Kentucky Court of Appeal. This was an action by a husband for the negligent killing of his wife. It is obviously, therefore, not in point. There is no relation of master and servant. If the wife had lived, she must have joined in the action, except to the extent of the husband's pecuniary loss for medicine, &c. But in the judgment the case of master and servant is mentioned. I do not very clearly understand it. The first position was, that the rule that no action lies for a felonious act before prosecution does not prevail in Kentucky. The second is this: "But, according to the principles of the common law, injuries affecting life cannot in general be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon. But for injury to life the civil remedy is considered as being entirely merged in the public office." This was said to be the established common-law doctrine in the case of *Baker v. Bolton*, *supra*. It is true Lord Ellenborough is reported to have said that in a civil court death could not be complained of as an injury.

But there is nothing else to justify the above opinion, and if this is the authority, *White v. Spettigue*, 13 M. & W. 603, shows its inapplicability here. The judgment proceeds: "The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence that, the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential." I have dealt with this argument before. It is this: "Wrongful death which causes a damage gives no action because it is death which causes it." The judgment proceeds to say "that damages may be recovered up to the time of death, but not beyond." The reason of this seems to be that all injuries affecting life caused by the misconduct of another person involve the commission of a public wrong, which merges the remedy for all private loss arising after death has occurred and occasioned by it. Why every death caused by misconduct is to be assumed to be a public wrong I know not. The misconduct may be actionable, though not criminal negligence. Nor do I know why, however this may be, the remedy for private loss should merge in it.

I do not like criticising a variety of authorities, and escaping from their general effect by a variety of small differences and objections. But in this case it seems to me that the principle the plaintiff relies on is broad, plain, and clear, — viz., that he sustained a damage from a wrongful action for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should show a clear and binding authority, either by express decision, or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in the English law. I find neither. With the exception of a short note of the case of *Baker v. Bolton*, *supra*, there is no semblance of an authority on this side of the Atlantic, and the cases from the other side are merely founded on that one, and some vague notion of merger in a felony. I may observe that Mr. Smith, in his excellent work on Master and Servant (3d ed. p. 139), assumes as certain that this action would lie.

CHAPTER XIV.

PRIVATE ACTION FOR DAMAGE CAUSED BY PUBLIC
NUISANCE:

FINEUX v. HOVENDEN.

41 *Elizabeth. Croke, Elizabeth, 664.*

ACTION on the case. Whereas there had been a way within the city of Canterbury leading from St. Peters street unto a street called Rushmarket; and that all the inhabitants of the city had used, time whereof, &c., to pass that way; and that the plaintiff was an inhabitant there; that the defendant had made a ditch and erected a pale [pole?] cross that way; whereby he had lost his passage, &c. The defendant pleaded not guilty; and by a *visne* awarded of W. in the County of Kent, by assent of the parties (in regard the cause concerned all the inhabitants of Canterbury), it was found for the plaintiff; and now moved, in arrest of judgment, that it was a mis-trial.

Secondly, It was moved by Coke, Attorney-General, that this action lies not for a private person; because it is a common nuisance, and is punishable in a court leet only, unless he can show some special prejudice, as 27 Hen. VIII., pl. 27, is; and so it was adjudged in this Court, in *Serjeant Bendlores v. Kemp*, that he might maintain an action upon some special prejudice. And at St. Alban's Term, in *Williams v. Johns*, 5 Co. 72, 73, it was adjudged, that where a chapel was within a manor, and the parson of the adjoining church used to read divine service every Sunday, for the lord and his tenants in the said chapel; and for that the parson had failed therein, the lord brought an action upon the case; and adjudged that it lay not; for so every one of the tenants might bring the like action, which would be inconvenient, that he should be liable to all their actions; but he ought to be punished by the ordinary in this case. But, peradventure, where there is not any other remedy to be had than by action, there every one may have his action who is grieved. And therefore, in *Westbury v. Povel*, where the inhabitants of Southwark had a common watering-place, and the defendant had stopped it, and the plaintiff, being an inhabitant there, brought his action upon the case, it was adjudged maintainable. But it is here punishable in the leet. Wherefore, &c. And of that opinion were POPHAM, GAWDY, and FENNER, that without a special grief shown

by the plaintiff, the action lies not. But CLENCH *e contra*; for the stopping of itself is a special prejudice to the plaintiff, that he cannot go that way. Wherefore it is reason he should maintain the action. *Sed adjournatur*.

ROSE v. MILES. \

1815. 4 Maule & Selwyn, 101.

ERROR to reverse a judgment of the Common Pleas. The plaintiff declares in one of the counts, that whereas the plaintiff before and at the time of committing the grievances by the defendants, was lawfully possessed of certain barges and other craft laden with goods, wares, and merchandises of the plaintiff, and just before and at the time of committing the grievances was navigating his said barges and craft so laden along a certain navigable creek, part of a certain public river, situate, &c., yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff, and to prevent him from navigating his barges and craft, so laden as aforesaid, along the said public navigable creek, heretofore, to wit, on, &c., wrongfully and injuriously moored and fastened, and caused to be moored and fastened, a certain barge across the said public navigable creek and the channel thereof, and kept and continued the said barge so moored and fastened across the said navigable creek, and the channel thereof, for a long space of time, to wit, from thence, hitherto, and thereby during all the time aforesaid obstructed the said public navigable creek and the channel thereof, and thereby prevented the plaintiff from navigating his said barges and craft so laden along the said public navigable creek; by reason of all which premises the plaintiff was not only during all the time aforesaid obliged to convey all his said goods, wares, and merchandises, a great distance overland, but was also during the time aforesaid put to great trouble and inconvenience in carrying on his business, and hath been obliged to expend divers large sums of money, to wit, £500, in and about the carriage of his said goods, wares, and merchandises, overland as aforesaid.

Plea, not guilty; and a general verdict for the plaintiff upon the whole declaration, with 20s. damages. And the errors assigned were that the supposed obstructions in the public navigable river in the declaration mentioned, are in the nature of a common nuisance to all the subjects of the realm, and not of a particular or private injury to the plaintiff; and it is not shown that the plaintiff has actually incurred or sustained any special damage by reason of such obstructions. Also, that the plaintiff has brought a personal civil action, and recovered damages therein for a grievance or nuisance remediable only by criminal prosecution. Also, that the declaration is not sufficient in law, &c. Joinder in error.

Marryat, in support of the errors, contended that the rule of law was clear, that for a common nuisance in a public highway the remedy is by indictment and not by action, unless there be some special damage alleged; the reason of which rule is for the avoiding of multiplicity of suits; for if this plaintiff may have an action, by the same rule every person navigating the creek may have the like action. Wherefore the plaintiff, in order to maintain this action, ought to show a particular damage. Thus it was considered in *Chichester v. Lethbridge*, Willes, 71 (see also Co. Lit. 56a); and thus according to *Hubert v. Groves*, 1 Esp. N. P. C. 148, the mere obstruction of the plaintiff's trade, or as it was resolved in *Paine v. Partrich*, Carth. 191, the delaying him in his journey a little while, by reason whereof he is damnified, or some important affair is neglected, is not such a special damage for which an action on the case will lie, but the particular damage ought to be direct and not consequential, as, for instance, the loss of his horse, or some corporal hurt. Now in this case the plaintiff has not declared for any particular damage, but generally that his craft was obstructed, by reason of which he was compelled to take his goods another way, and put to inconvenience and expense, all which is consequential, and must be common to every one who before used the way, and there is no direct damage to his property or person.

LORD ELLENBOROUGH, C. J. In *Hubert v. Groves* the damage might be said to be common to all, but this is something different, for the plaintiff was in the occupation, if I may so say, of the navigation; he had commenced his course upon it, and was in the act of using it when he is obstructed. It did not rest merely in contemplation. Surely this goes one step farther; this is something substantially more injurious to this person, than to the public at large, who might only have it in contemplation to use it. And he has been impeded in his progress by the defendants wrongfully mooring their barge across, and has been compelled to unload and to carry his goods overland, by which he has incurred expense, and that expense caused by the act of the defendants. If a man's time or his money are of any value it seems to me that this plaintiff has shown a particular damage.

BAYLEY, J. The defendants in effect have locked up the plaintiff's craft whilst navigating the creek, and placed him in a situation that he unavoidably must incur expense in order to convey his goods another way.

DAMPIER, J. The present case I think admits of this distinction from most of the other cases, that here the plaintiff was interrupted in the actual enjoyment of the highway. The expense was incurred by the immediate act of the defendants, for the plaintiff was forced to unload his goods, and carry them overland. If this be not a particular damage, I scarcely know what is.

Per Curiam.

Judgment affirmed.

Heath was to have argued for the defendant in error.

GREASLY v. CODLING.

1824. 2 Bingham, 263.

THE plaintiff declared against the defendants in case, for shutting, and keeping shut, a gate across a public highway, and thereby compelling the plaintiff, who was driving three laden asses, to go back and perform his journey by a very circuitous route.

The object of the action was to establish a right of way. At the trial, before Hullock, B., and a special jury, at the Nottingham Lent Assizes, 1824, the plaintiff, a retail coal-higgler, proved the right, and the disturbance of it by the defendants, as alleged in the declaration. It appeared that he was in the habit of passing up and down the road with coals; that upon the day in question he had been delayed four hours, and that he could perform his journey three times a day on the road in which he had been interrupted, but not so often by the circuitous route.

The learned judge directed the jury, that if a party had sustained injury or expense, by the obstruction of a public way, that was a ground of action; but that it would be outrageous if every individual could bring an action for every obstruction. The jury found a verdict for the defendants.

Vaughan, Serjt., in the last term, obtained a rule *nisi* to set aside the verdict and have a new trial, on the ground that the jury had been misdirected, and that the suffering of inconvenience would give the plaintiff a right to damages, although he should not have incurred personal injury or expense. He cited *Rose v. Miles*, 4 M. & S. 101.

Pell, Serjt., who showed cause against the rule, cited *Hubert v. Groves*, 1 Esp. N. P. C. 148; Year Book, 27 H. 8, 27, Moore, 180; *Fineux v. Hovenden*, Cro. Eliz. 664; *Paine v. Partrich*, Carth. 193; *Chichester v. Lethbridge*, Willes, 74, and Durnford's note to that case, to show that the mere inconvenience of delay was not a sufficient injury to entitle a party to sustain an action, but that he must allege and prove some further and special damage.

BESR, C. J. This is a rule calling on the defendants to show cause why the verdict found for them should not be set aside, on the ground of a misdirection by the learned judge who presided at the trial, and it appears to us that the direction was wrong, and that the verdict ought not to stand. On the declaration it appears that the plaintiff possessed three asses, and was driving them along the public way; that while he was so using the way one of the defendants shut a gate, and obliged him to take a more circuitous course; and this statement has been made out in evidence. The question, therefore, is, whether a man travelling along the high road can maintain an action (not if he is stopped by the road being casually out of repair,

but), if he is stopped by the hand of the defendant. We cannot determine here what was the object or end of the journey, or what injury the plaintiff sustained in the pursuit of that object, — that the jury must determine; but can he maintain an action for this obstruction? It has been contended he cannot, unless he proves a special damage; but even in a case of public nuisance, if any one has been distinguished in injury, he may sue the offender, and the many old cases which have been cited do not apply, because in those no special damage was alleged, whereas in the present it has been distinctly stated. In the case in *Carthew*, indeed, there is an expression in favor of the defendants, namely, that the action will only lie for a personal injury, and not for a mere injury by delay. I cannot see the difference, because injury from the one cause may be quite as prejudicial as injury from the other; but the ground of decision in that case was, that no special damage was stated. In *Rose v. Miles*, which was long subsequent to the case in *Espinasse*, Lord Ellenborough says, “This is something more substantially injurious to this person than to the public at large, who might only have it in contemplation to use it, and he has been impeded in his progress by the defendants wrongfully mooring their barge across, and has been compelled to unload, and to carry his goods over land, by which he has incurred expense, and that expense caused by the act of the defendants: if a man’s time or his money are of any value, it seems to me that this plaintiff has shown a particular damage.” I cannot distinguish *Rose v. Miles* from the present case; in that, as in the present, the nature of the injury appeared upon record, and it resembled that of which the plaintiff complains, in all respects, except that the public way was a canal instead of a road, and the party was obstructed by a barge instead of a gate. The judges delivered their opinions *seriatim*, that where any damage was incurred, an action would lie. On the authority of that case, and the reason of the thing, this verdict must be set aside.

PARK, J. *Paine v. Partrich* is clearly distinguishable from the present case, for the thing complained of was only a common nuisance; the plaintiff had suffered no particular injury, and the judgment was given on that ground. The Court said the action would not lie unless a particular injury had been incurred, and the expressions of the judges that seem to make for the present defendants, are only put by way of instance. But *Rose v. Miles* is precisely the same as the present case, and the plaintiff is, therefore, entitled to make his rule absolute.

BURROUGH, J. The question, in all these cases, is, whether the inconvenience complained of is general, or a particular inconvenience of the party complaining; that is the point of the decisions, and who can doubt about the particular injury in the present case? A man travelling with asses is stopped, and obliged to go by a circuitous course, with an obvious loss of time and profit; what distinction is there in principle between such a case and that of a man who is carrying £10,000 worth of goods, to arrive by a given day, and is deprived of

his market by an individual obstructing the road? There was no dispute about the facts, and the jury ought not to have found a verdict for the defendants.

Rule absolute.

HOUCK v. WACHTER.

1870. 34 *Maryland*, 265.¹

APPEAL from the Circuit Court for Frederick County.

The facts are sufficiently given in the opinion of the Court.

The cause was argued before BARTOL, C. J., STEWART, MILLER, ALVEY, and ROBINSON, JJ.

Albert Ritchie, for appellant.

Wm. P. Maulsby, Jr., for appellee.

BARTOL, C. J. This suit was brought by the appellee to recover damages for the alleged obstruction of a highway by the appellant.

The first question presented by the record, and one which, in the opinion of a majority of this Court, is decisive of the case, arises upon the demurrer to the amended declaration. The ground of the demurrer is, that the declaration does not contain any sufficient averment of special and particular damage suffered by the plaintiff from the obstruction complained of, to support the action. The obstruction of a highway is a common nuisance, and, being a wrong of a public nature, the remedy is by indictment; it is not in itself a ground of civil action by an individual, unless he has suffered from it some special and particular damage, which is not experienced in common with other citizens. 9 Md. 178. In such case, the actual damage constitutes the gist of the action, and must be averred and proved.

These principles are well settled, and the only difficulty that can arise grows out of their application to particular cases. With respect to what constitutes such special and particular damage, the decisions do not appear to have been entirely harmonious. We think, however, the present case is free from difficulty, and, by recurring to the averments in the declaration, is of simple and easy solution.

After alleging the existence of the common highway, and that it was the customary, and most direct and convenient route for the plaintiff to pass and re-pass to and from the county, town, mills, market, etc., with his horses, wagons, and carriages, the declaration avers that the defendant wrongfully obstructed the same, by building a fence across it, which prevented the plaintiff from driving his horses, etc., laden with the products of his farm, and other commodities, over said highway, by reason of which the plaintiff was obliged to drive his horses, etc., laden as aforesaid, back again, and by a very circuitous road, and for a much greater distance than he otherwise would, and of right ought to have done.

¹ Arguments omitted. — ED.

Then follows the averment of special damage in the following words:—

“ And the plaintiff says that he had made a journey with his said horses and wagons, from his said farm, through and over said highway, to his market-town, to wit: Frederick city in said county, and on his said journey, was returning to his said farm, when he met the said obstruction, and was withheld by the defendant from removing the same, so that he could not pass, and was obliged to proceed to his said farm, from said market-town, by a very circuitous route; and the plaintiff says that, at divers other times he was greatly hindered and delayed, and put to great loss of time and money, by reason of being compelled, by means of said obstruction, to go and return, pass and re-pass to and from his said farm, by a very circuitous road, and of much greater distance to the said market-town, and to mills and said court-house, than he otherwise would and of right ought to have done, with his said horses, wagons, and carriages, laden as aforesaid; and, by means of shutting up and closing said highway, wrongfully prevented him, the said plaintiff, from driving and conducting his said horses, wagons, and carriages, laden as aforesaid, over and along said highway, as he was used and accustomed and of right ought. And the plaintiff says that, by the means aforesaid, he hath been, and still is, deprived of the use of said highway, to which he is entitled, and hath sustained damage to the value of \$1,000.”

We have set out at length the averments in the declaration, in order that it may be seen whether the allegation of special damage to the plaintiff is of such a nature as to entitle him to maintain the action. It is not averred that the highway, which was obstructed, was the only way to and from his farm, or that it was necessary to enable him to pass and re-pass from his farm to mill, market, etc. The averment is, that it was the most direct and convenient route.

By its obstruction, therefore, he experienced no other damage or inconvenience, except such as was common to other citizens having occasion to pass by that way: they, as well as himself, were obliged to go by a longer or more circuitous route.

The special damage alleged is, that having gone to Frederick city by the highway in question, as he was returning home he met the obstruction, was withheld by the defendant from removing it, and in consequence “ was obliged to proceed to his farm by a very circuitous route.”

This is nothing more than a statement of a particular instance, in which the plaintiff suffered an inconvenience which was common to the rest of the community, and is not, in our opinion, such special damage as entitles him to maintain this action.

The objection is not to the form of the averment, but is substantial, going to the very ground and cause of action, which, as was said by Tindal, C. J., in *Wilkes v. Hungerford Manufacturing Co.*, 2 Bing. (N.C.) 281, exists only “ where the plaintiff has sustained some peculiar injury beyond that which affects the public at large.”

All the authorities agree that to support the action the damage must be different, not merely in degree, but different in kind from that suffered in common, hence it has been well settled that though the plaintiff may suffer more inconvenience than others from the obstruction, by reason of his proximity to the highway, that will not entitle him to maintain an action. *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, id. 511, 514; *Quincy Canal v. Newcomb*, 7 Metc. 283.

A great number of cases, both English and American, were cited at the bar, and have been examined by us, in which the question has been considered, as to what will constitute such special or particular damage as to entitle a party to sue for an obstruction of a highway.

We deem it unnecessary to refer to them here particularly, or to enter upon an analysis of them. As we before remarked, the decisions are not without some apparent conflict. But we have found no well-considered case which sustains the judgment of the Court below on the demurrer, or justifies us in holding the damage here alleged to be sufficient.

Rose v. Miles, 4 Maule & Selw. 101, has been much relied on by the appellee. In that case the plaintiff was obstructed in navigating a river by the defendant wrongfully mooring a barge across it; it was held that he could maintain his action, it being alleged that he was compelled to unload his barges and carry his goods overland, by which he incurred great expense. But that case is very unlike this; here no substantial damage is alleged. The case most resembling this is *Greasly v. Codling*, 2 Bing. 263, in which the plaintiff had been delayed four hours by an unlawful obstruction in a highway, and his being thereby prevented from performing the same journey as many times in a day as if the obstructions had not existed, was held to be a sufficient special or particular injury to entitle him to maintain a suit. But it appeared in that case that the plaintiff was engaged as a "coal higgler;" his occupation was carrying coal upon the highway, and the damage he suffered was in the conduct of his business and of a substantial nature; and was held to be different in kind from that suffered by the public at large.

The case of *Greasly v. Codling* was decided in the common pleas in 1824, and was ruled upon the authority of Lord Ellenborough's judgment in *Rose v. Miles*, and we think carried the doctrine in support of such actions farther than the previous decisions would warrant. But the case before us cannot be brought even within the principles of *Greasly v. Codling*.

In England, the tendency of more recent decisions has been rather to restrict the rule regulating the cases in which this description of action may be maintained; and we agree with what was said by Martin, B., in the late case of *Winterbottom v. Derby*, that the rules of law allowing such actions ought not to be extended.

The case of *Winterbottom v. Derby*, L. R. 2 Exch. 316, decided in 1867, was very analogous to this. The plaintiff sued for damages

caused by the obstruction by the defendant of a highway, being a public footway, alleging "that he was on divers days hindered and prevented from passing and re-passing over and along said footway and using the same, and was obliged to incur, and did incur, on divers days, great expense in and about removing said obstructions, in order that he might, and before he could, pass and re-pass over and along the said footway, and use the same in and about his lawful business and affairs, and was greatly hindered and delayed in and about the same." It was decided, all the judges concurring, that the action could not be maintained. In the course of the argument Kelly, C. B., said: "But he is not damaged more than others of the public who may happen to pass along the way. The result of this argument would seem to be that every individual who attempted to pass along the path could bring an action." And in rendering his judgment, after stating that the plaintiff had suffered an inconvenience common to all who happened to pass that way, the same learned judge remarked: "I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which an action could not be maintained." This observation, we think, may be applied with great propriety to the present case.

In the same opinion the true principle is stated to be, "that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade or calling."

As no such damage is alleged in the declaration in this case we are of opinion the demurrer ought to have been sustained. The judgment must therefore be reversed; and it is of course unnecessary to express any opinion upon the questions presented by the bills of exceptions.

Judgment reversed.

[A dissenting opinion by STEWART, J., is omitted.]

X

PIERCE v. DART.

1827. 7 Cowen, 609.

ON certiorari from a justice's court. Dart sued Pierce, in the Court below, for a nuisance, in building a fence across a public highway, near the residence of the plaintiff below, in consequence of which he complained that he had received special damage.

Several questions were now raised by the counsel for the plaintiff in error, which it is not deemed important to notice. The main questions were, whether the special damage received by the plaintiff below was of that nature and extent which would warrant an action by him, or, whether the remedy lay in a public prosecution only; and whether, if the plaintiff below could otherwise have sustained an action, it was

not barred by his having abated the nuisance. The facts as to these two heads will be found sufficiently stated in the opinion of the Court.

L. Monson, for the plaintiff in error.

E. Root and *S. R. Hobbie*, *contra*.

CURIA. (After overruling several minor objections raised by the counsel for the plaintiff in error.) The only real questions are (1), Whether the plaintiff below showed such special damage as entitled him to recover; and (2), If that was shown, whether his abating the nuisance was such a remedy as barred his action.

In considering the special damage, we must lay out of view the fact now set up, that the road was more contiguous, and therefore more beneficial to the plaintiff below than to others. He might have been more injured by the obstruction on this account than others; but it is not such an injury as the law will notice. The right of action for obstructing a highway can never be determined by the distance at which the party resides from it. All the cases agree that there must be some specific damage to the party before he can sue.

The only evidence of damage in this case is derived from the testimony of Seely. He swears that Dart had considerable trouble in pulling down the fence. The witness was with Dart four times when he pulled it down; once when Dart was returning from church, and again when he had been out and was returning home in a severe rain storm.

The defendant openly declared at the trial that he had erected the fence, and intended to do it again; though we understand from the return that he had not yet done so at the time of the trial, after it was last abated by the plaintiff.

The damage to the plaintiff was but a trifle. It consisted in the delay and the time spent in abating the nuisance. Gibbs would not place it higher than six cents at each abatement, or twenty-five cents in the whole.

It is conceded that special damage would maintain the action; but denied that this is the kind of damage intended by the rule. The question is certainly not without its difficulties. The English cases have fluctuated; and until a recent decision of the King's Bench no rule defining the nature or limit of the individual injury which is to warrant the action can be found. In *Hart v. Bassett*, T. Jones, 156, it was held enough that the plaintiff was obliged by the obstruction to convey his tithes by a more circuitous route. *Iveson v. Moor*, Carth. 451, gave an action where the plaintiff was prevented from carrying his coal in carts and carriages; and *Chichester v. Lethbridge*, Willes, 71, holds that obstructing the highway by bars, &c., and withholding the plaintiff from abating the nuisance so that he could pass, was sufficient.

Hubert v. Groves, 1 Esp. Rep. 148, and which was considered by the King's Bench on motion for a new trial, held, that being put to the necessity of going a circuitous route was not such special damage as would warrant the action. And there is a *dictum* in *Paine v. Partrich*,

Carth. 194, that delay of a journey by which one is damnified and some important affair neglected is insufficient. •

Nor are the American cases exactly uniform. In *Hughes v. Heiser*, 1 Bin. 463, where the cases already mentioned are considered, the plaintiff recovered on the ground that he was prevented from passing down the Big Schuylkill with his rafts. But in *Barr v. Stevens*, 1 Bibb's Kentucky Rep. 293, Trimble, J., in delivering the opinion of the Court, says it is not enough that one is turned out of his way; and he seems to require that some corporal damage should arise from the injury.

The late case of *Rose v. Miles*, 4 M. & S. 101, overrules the *dictum* in *Paine v. Partrich*, and the case of *Hubert v. Groves*. It adopts the other English cases, with the principle of *Hughes v. Heiser*; and, for the first time, seems to furnish an express general rule for the class of cases which we are considering. The plaintiff's passage down a public navigable river was obstructed, and he was put to expense in going a circuitous route. An action on the case for this injury was sustained by the whole Court; and we think the principle to be extracted from the case is, that any, the least injury to an individual, as an expense of time or money, or labor, &c., entitles him to an action. It is a special damage, as contra-distinguished from the injury to the public in general, which is theoretical, or resting in presumption of law only. Lord Ellenborough said the injury did not rest merely in contemplation. The plaintiff was impeded in the act of navigating, and incurred expense. If a man's time or money is valuable it seemed to him that this was a particular damage.

Such seems to be the distinction deducible from a majority of the cases.

In the case at bar, the plaintiff was certainly put to some expense. There was a delay and labor in abating the nuisance so that he might proceed on the road. True, the injury was trivial; and it is not difficult to see that the damages are excessive. But we cannot interfere on that ground where the action below is for a tort.

But it is contended that the remedy by action was barred by the abatement; that the plaintiff, having taken the means of redress into his own hands, is concluded, as in case of distraining an article *damage feasant*. We do not understand this to be the effect of removing a nuisance. True, it is treated in the books as a remedy by the act of the party. But it does not operate to redress the injury like a distress. It is preventive merely; and resembles more an entry into land, or recaption of personal property. Neither will bar an action for the original invasion of the plaintiff's right. Suppose in this case the plaintiff's horse or carriage had been injured; would it be pretended that his afterwards throwing down the fence should operate as an indemnity? The case at bar depends on the same principle.

The judgment below should be affirmed.

Judgment affirmed.

WINTERBOTTOM v. LORD DERBY.

1867. *Law Reports, 2 Exchequer*, 316.

DECLARATION. That the defendant on divers days wrongfully obstructed a certain public footway, in the township of Pilkington, in the parish of Prestwich, in the county of Lancaster, by placing upon and across the said footway, in divers places, posts, rails, and fences, whereby the plaintiff was on divers days hindered and prevented from passing and repassing over and along the said footway, and using the same, and was obliged to incur, and did incur, on divers days, great expense in and about removing the said obstructions, in order that he might and before he could, pass and repass over and along the said footway, and use the same in and about his lawful business and affairs, and was greatly hindered and delayed in and about the same.

Pleas: 1. Not guilty; 2. Traverse that the footway was a public footway. Issue thereon.

The action was brought to try the right of the public to use a footway across some property belonging to the Earl of Derby, leading from a lane called Park Lane, in the township of Pilkington, to Prestwich, and thence to Manchester. At the trial before Mellor, J., at the last Manchester spring assizes, it was proved that the plaintiff, who resided near Manchester, had from time to time made use of the footway without any objection on the part of the defendant or his agent. About three years ago, however, the defendant's agent, who lived close to the land crossed by the footway, began to make great alterations, and erected some fences and other obstructions upon the way. He also ploughed over a portion of it, and in some parts almost obliterated it. The plaintiff, in spite of the path having thus become less convenient, continued to use it. On Sunday the 6th of May, 1866, whilst he was approaching the Park Lane end of the path, with a view of passing along it, he met the defendant's agent, who informed him that there was no road that way. The plaintiff replied that there was one, which he had often used before, and intended to use on that day, and after making this observation, passed along the footway. On the 16th of August, 1866, he again, in company with some friends, went to Park Lane, with the intention of traversing the footway. He found it obstructed, and was delayed whilst some persons under his directions, and at his expense, removed the obstructions. On several subsequent occasions he renewed the attempt to use the path, but on each was either obliged to turn back, in consequence of obstructions being placed across it, or else was delayed whilst those obstructions were removed. He suffered no other damage beyond being thus forced, in common with all other persons attempting to use the path, either to retrace his steps and pursue his journey by another road, or else to remove the obstructions. The footway was the shortest and most con-

venient way from his house to Prestwich. He had been in the habit of using it either for the purpose of taking a walk, or of going to see friends at Prestwich, or otherwise for pleasure or profit.

In order to show that the way was a public way, acts of user over it were proved, extending over nearly seventy years. But the land it crossed had, during the whole period, been on lease; and it was contended on behalf of the defendant that he, as reversioner, was therefore not bound by these acts, and that no dedication by him or his ancestors of the footway to the public could be presumed from them. But the learned judge told the jury that, from long continued user, going back indeed as far as living memory could go, they were at liberty, if they pleased, to infer a dedication of the footway to the public, by Lord Derby's ancestor, at a time antecedent to the land being on lease. The jury found a verdict for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit, on the ground that the plaintiff had not given sufficient evidence of damage to entitle him to maintain the action.

April 17. *Temple*, Q. C. (*Jones*, Q. C., and *J. A. Russell*, with him), moved accordingly, and in arrest of judgment, on the ground that the declaration did not allege any sufficient cause of action; and also for a new trial, on the ground that the verdict was against the weight of the evidence, and of misdirection on the part of the learned judge in this, that he told the jury they might presume a dedication of the public footway against the defendant, the reversioner, from acts of user in the period during which the land had been on lease. In support of this last point he cited *Wood v. Veal*, 5 B. & A. 454 (E. C. L. R. vol. 7), where it was held that there could be no dedication of a way to the public by a tenant for ninety-nine years, without the consent of the owner of the fee, and that permission by the tenant would not bind the reversioner after the expiration of the term. In that case there had been user as far back as living memory went. He also cited *Baxter v. Taylor*, 4 B. & Ad. 72 (E. C. L. R. vol. 24).

The Court (*Kelly*, C. B., *Martin*, *Bramwell*, and *Pigott*, BB.), without desiring to cast any doubt on the authorities cited, thought that there had been no misdirection, and on that point, therefore, refused the rule. On the remaining points they granted a rule.

June 1, 6. *James*, Q. C., *Quain*, Q. C., and *R. G. Williams*, showed cause.—The plaintiff suffered an inconvenience peculiar to himself. He resided in the neighborhood of the path, and his most direct road to a place to which he had frequent occasion to go, was along it. Then by the obstructions he was delayed, either whilst he had them removed, or by being forced to go a roundabout way to his destination. He is thus damaged beyond the rest of the public.

[*Kelly*, C. B. But he is not damaged more than others of the public who may happen to pass along the way. The result of this argument would seem to be that every individual who attempted to pass along this path could bring an action.]

Every one actually obstructed, and who is driven either to go back or is delayed whilst removing the obstruction could maintain an action; and if it be said this would lead to a multiplicity of actions, the answer is, that the person causing the obstruction would have brought them on himself. An indictment for obstructing a highway is grounded on the *possibility*, and not the fact, of the public being prevented from using it; but any one who suffers, personally, positive inconvenience from the obstruction need not have recourse to an indictment. He can maintain his action for the personal injury he has sustained; Com. Dig. *Action for Nuisance* (C.) 294; *Meynell v. Saltmarsh*, 1 Keb. 847; *Hart v. Bassett*, Sir T. Jones, 156, 4 Vin. Abr. 519; *Iveson v. Moore*, 1 Ld. Raym. 486; *Rose v. Miles*, 4 M. & S. 101 (E. C. L. R. vol. 30), explaining *Hubert v. Groves*, 1 Esp. 148; *Rose v. Groves*, 5 M. & G. 613 (E. C. L. R. vol. 44).

[CHANNELL, B. The principle laid down in *Iveson v. Moore*, and the other cases, is sound. The question is, as to the proper mode of applying it.]

That principle is, that *delay*, however caused, whether in removing the obstruction or going a less convenient way, is a cause of action: *Greasly v. Codling*, 2 Bing. 263 (E. C. L. R. vol. 9); *Wiggins v. Boddington*, 3 C. & P. 544 (E. C. L. R. vol. 14). In *Chichester v. Lethbridge*, Willes, 71, the action was held to be maintainable on either of two grounds. First, because the defendant had offered personal opposition to the nuisance being abated; and secondly, because the plaintiff had been delayed; and Erle, C. J., is in error in stating in *Ricket v. Metropolitan Railway Company*, 5 B. & S. 156, 160, 34 L. J. Q. B. 257, 259, that the decision rested on the first ground only.

[CHANNELL, B. That ground seems the more intelligible. The plaintiff in that case was prevented from abating the nuisance, and was thus entitled to bring his action.]

The decision of Willes, C. J., rests distinctly on both grounds.

Temple, Q. C., *Jones*, Q. C., and *J. A. Russell*, in support of the rule. — All the cases cited are distinguishable. In all of those in which the action has been held maintainable the plaintiff has suffered a greater inconvenience than the rest of the public, who are obstructed in the exercise of their right; see per Erle, C. J., in *Ricket v. Metropolitan Railway Company*, 5 B. & S. 159, 34 L. J. Q. B. 259. Thus, in *Hart v. Bassett*, Sir T. Jones, 156, 4 Vin. Abr. 519, the plaintiff was prevented from carrying home tithes. But in *Paine v. Partrich*, Carth. 191, where the plaintiff's damage, as here, was a short delay, it was held that this injury, not being beyond that suffered by the public in general, was not actionable. The rule of law is accurately laid down by Lord Ellenborough, C. J., in *Rose v. Miles*, 4 M. & S. 102, who says that the damage must be "something substantially more injurious" to the individual than to other people. In the present case the plaintiff neither proved nor alleged such substantial injury.

KELLY, C. B. The substantial point for our decision in this case is

whether this action is maintainable. The rule of law on the subject, which is well laid down in the case of *Ricket v. Metropolitan Railway Company*, 5 B. & S. 156, 34 L. J. Q. B. 257, is, that in order to entitle a plaintiff to maintain an action; he must show a particular damage suffered by himself over and above that suffered by all the Queen's subjects. I will refer to one or two authorities in support of this proposition. The leading case is that of *Iveson v. Moore*, 1 Ld. Raym. 486; and it is laid down there by Lord Holt that there must be a particular damage done to a particular person in order to found an action, otherwise there would be danger of a multiplicity of actions. It was observed, indeed, during the argument, that people must be careful not to violate the law, and if they do so, they must take the consequences. Observe, however, to what this argument may lead. It often, for some reason or other, becomes absolutely necessary to set up an obstruction in a highway. For example, commissioners of sewers, gas companies, or commissioners for draining, paving, or lighting may be obliged for a time to obstruct a highway. Now, suppose it were to turn out that there was some want of authority for the appointment of the commissioners, or some unintentional deviation from the statutory powers conferred on them, they would of course be liable to an indictment for wrongfully obstructing the highway. But if we were to hold that everybody who merely walked up to the obstruction, or who chose to incur some expenses in removing it, might bring his action on the case for being obstructed, there would really be no limit to the number of actions which might be brought.

Again, let us look further at the general nature of the cases where an action for obstruction has been held to be maintainable. In *Iveson v. Moore*, 1 Ld. Raym. 486, the plaintiff was the possessor of a colliery, and was obliged, in order to obtain the profits of his trade, to take laden carts and wagons, almost every day, along a certain highway. Then, by reason of that highway being obstructed, he personally sustained pecuniary damage. That was clearly special damage to the plaintiff alone. Once more, look at another case, — a case which apparently makes most for the plaintiff; I refer to *Hart v. Bassett*, Sir T. Jones, 156, 4 Vin. Abr. 519. There the plaintiff, a farmer of tithes, was prevented, by the defendant's obstruction, from carrying them home, and the obstruction must have been attended with considerable loss to the plaintiff. He had to take tithe, and he was liable to an action if he allowed the tithe to be injured on the ground, or if it was not taken within a reasonable time. The plaintiff, then, in that case, was obliged, in consequence of the obstruction, to spend extra money in the discharge of his lawful calling. That, therefore, was clearly a case where there was a peculiar pecuniary damage suffered personally by the plaintiff.

With regard to the cases cited for the other side, and to the law as to the cases where an action has been held to be not maintainable, it may, perhaps, be difficult to reconcile them. But it is impossible to

look at the case of *Ricket v. Metropolitan Railway Company*, 5 B. & S. 156, 34 L. J. Q. B. 257, and at the observations in the judgments of the learned law lords on it,¹ without seeing that they thought the law had been too far extended in the direction of allowing this description of action to be brought. In this case, therefore, where there was no pecuniary damage — where the plaintiff merely, on one or more occasions, went up to the obstruction and returned, and on other occasions went and removed the obstruction — that is to say, where he suffered an inconvenience common to all who happened to pass that way, — I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could not be maintained.

Then there is the particular allegation in the declaration as to expense, stating that the plaintiff “was obliged to incur, and did incur on divers days, great expense in and about removing the said obstructions.” That raises the question whether this sort of damage is recoverable. I think not; for if it were, anybody who desires to raise the question of the legality of an obstruction has only to go and remove it, and then bring his action for the expense of removing it. There would then be two modes open to everybody of trying whether the obstruction was lawful, namely, by indictment or by action. But if a person chose the latter way, and removes the obstruction, he only incurs an expense such as any one who might go to remove the obstruction would incur. The damage is in one sense special, but it is, in fact, common to all who might wish, by removing the obstruction, to raise the question of the right of the public to use the way. Upon the authorities, then, and especially relying on *Iveson v. Moore*, 1 Ld. Raym. 486, and *Ricket v. Metropolitan Railway Company*, 5 B. & S. 186, 34 L. J. Q. B. 257, I am of opinion that the true principle is, that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say that they could, would really in effect be to say that any of the Queen’s subjects could. We must therefore make the rule absolute to enter a verdict for the defendant on the plea of not guilty.

MARTIN, B. I am of the same opinion. I do not think that damage of the sort proved here is sufficient to enable the plaintiff to maintain this action. I have, indeed, some doubt whether we ought not to arrest the judgment. But whatever course we take in point of form, I feel that we ought not to extend the rule which regulates the cases in which this description of action may be maintained.

CHANNELL, B. I am of opinion that the defendant is entitled to have a verdict on the plea of not guilty. The plaintiff cannot maintain this

¹ The judgment of the Court of Exchequer Chamber was affirmed in the House of Lords on the 16th of May last (see Weekly Notes, vol. ii. p. 157); and the judgments of the learned law lords had been handed to the Lord Chief Baron during the argument.

action without showing that he has suffered damage beyond and in excess of what other people have suffered, and he has, in my judgment, failed to show any such damage. But I do not think that we should arrest the judgment. The right course is, in my opinion, to enter a verdict for the defendant on the plea of not guilty. My reason for saying so is this:—an application to arrest judgment assumes that all the allegations in the declaration are proved, either because they have not been traversed, or because, if they have been, the issues raised on them have been found in favor of the party against whom the application is made. Therefore, though for convenience the two questions as to arresting judgment or entering a verdict are often argued together, a motion in arrest of judgment assumes that the verdict stands; and I am not prepared to say that, in that event, and assuming the truth of the declaration *in toto*, we should arrest the judgment. Then, again, I do not think we ought to enter a nonsuit. In point of form, leave was reserved to do so, and to do nothing else. But where a plaintiff has obtained a verdict on a material issue, it would not be just to enter a nonsuit, even though leave so to enter it was in form reserved. I think, however, that we ought to enter the verdict for the defendant on the first issue, just in the same manner as if the reservation had been to do that instead of to enter a nonsuit. The real meaning of reserving leave is to raise a point of law for the consideration of the Court, and they have to deal with the case as they think best in the interests of justice. Whether it is formally to enter a verdict or nonsuit, or to do only the one or the other, does not, in my judgment, make any difference in the power of the Court to deal with the case as they think best.

Rule absolute accordingly.

FRITZ v. HOBSON.

1880. *Law Reports, 14 Chancery Division, 42.*¹

ACTION brought to restrain an alleged nuisance and for damages.

Plaintiff was the occupier of a house and shop situate on the east side of Fetter lane, in the city of London, where he carried on business as a dealer in pictures, old china, and other curiosities, and also as a tailor. The house was situate on the north side of, and was bounded on the south side by, a narrow passage, which led in an easterly direction out of Fetter lane into a narrow court called Fleur-de-Lis court, which ran in a direction approximately parallel to Fetter lane. This court was also approached by another narrow passage (which was known as part of Fleur-de-Lis court), leading eastward out of Fetter lane, but situate south of, and nearer to Fleet street, than the passage which led by the plaintiff's house (which will for the sake of distinction

¹ Portions of the opinion are omitted. — Ed.

be henceforth called "the plaintiff's passage"). Both the passages, as well as Fleur-de-Lis court, were public thoroughfares. The north end of Fleur-de-Lis court communicated with another passage called Trinity Church passage, which was situate to the north of plaintiff's house and ran eastward out of Fetter lane. The east end of the plaintiff's house was bounded by Fleur-de-Lis court. The plaintiff's shop had a window looking on Fetter lane, and another window looking on plaintiff's passage, and the entrance door of the shop, as well as the private door of the house, opened on the plaintiff's passage.

On the east side of Fleur-de-Lis court, and nearly opposite the east end of the plaintiff's house, were some premises belonging to a society called the Scottish Corporation. Access could be obtained to these premises from Fetter lane by means of any of the three passages which led from it into Fleur-de-Lis court, that is, Trinity Church passage, the plaintiff's passage, and the passage forming part of Fleur-de-Lis court further to the south. The only other mode of access to the premises was through a narrow court called Crane court, which led direct from the north side of Fleet street to the south side of the premises. The distance of the premises from Fleet street by Crane court was eighty-four yards; the distance from Fetter lane by the plaintiff's passage was about fifty feet. No cart or wagon could approach close to the premises, all the passages by which access could be obtained being only footways. The nearest point to which carts or wagons could approach was the Fetter lane end of the plaintiff's passage. The entrance to Fleur-de-Lis court from Trinity Church passage was too narrow to be used for the carrying of building materials.

The defendant, a builder, entered into a contract with the Scottish Corporation for the rebuilding of a new hall on their premises in place of an old hall which had been then recently destroyed by fire. The defendant's operations were commenced on the 21st of May, 1879, and were continued for some months. The operations consisted of pulling down what remained of the old hall, removing the old materials, excavating the foundations of the new hall, removing the earth excavated, carrying in the new materials, and the scaffolding and other implements employed in the erection of the new building, and removing those implements when the work was completed. The new materials included more than 200,000 brick, a number of iron girders, and a quantity of stone, some of which was brought in large blocks, which were afterward cut up in Fleur-de-Lis court, sand and lime. The greater part of the old materials were carried out, and the greater part of the new materials were carried in through the plaintiff's passage.

The writ in the action was issued on the 7th of August, 1879, at which time the defendant's building operations were still in progress. By his statement of claim, delivered on the 29th of October, 1879, the plaintiff alleged various acts of trespass on the part of the defendants,

and various injuries and nuisances caused to him by the defendant's acts. The main ground of the complaint was contained in the following allegations : —

“The defendant in the course of his building operations at various times has entirely prevented any access to and during the whole thereof has greatly and needlessly interfered with the means of access to the plaintiff's house, and in particular to the front part thereof, used by him as a shop. On numerous occasions the defendant has blocked up the said passage” (*i. e.*, the plaintiff's passage) “so as to prevent any one, including the plaintiff and his customers, from going into or out of the said passage, and on the same and on other occasions he has blocked up the doorways of the plaintiff's house. He has also at improper times, particularly during the business hours of the day, and for an unreasonable length of time, blocked up the street and occupied the pavement in front of the plaintiff's house, by keeping his horses, carts, building materials, and workmen there standing.”

The plaintiff alleged that by these acts of the defendant his customers, and other persons who would have become his customers, had been prevented from going to his shop and from looking into the windows thereof to observe the articles exposed for sale therein, and that his business had been greatly injured thereby, and his average takings seriously diminished.

The plaintiff claimed an injunction and damages.

By his statement of defence the defendant denied the alleged wrongful acts, and denied that the plaintiff had been injured by reason of any act done by him. And he alleged that he had a right to use the plaintiff's passage in connection with his building operations in the manner in which he had used it.

North, Q. C., and *Seward Brice*, for plaintiff.

Cookson, Q. C., and *Northmore Lawrence*, for defendant.

Fry, J., after stating the nature of the relief claimed, and observing that the trespasses proved, as distinguished from the nuisance, were of the most trifling description, and that he could only award the plaintiff one farthing damages in respect of them, continued : —

The serious part of the case arises out of the allegation of loss of custom to the plaintiff in his character of a dealer in articles of antiquity, old china, and so forth, and a tailor.

With regard to the business of a tailor there is no evidence of loss ; the other business I shall consider presently.

The plaintiff puts his case in two ways. He says, first, the defendant has created a public nuisance, which has resulted in special or peculiar damage to me in consequence of the place where I reside and the place where the nuisance has been committed being so near to each other ; and, secondly, I have a private right of entrance from the highway to my dwelling-house, and that private right the defendant has interfered with.

Before I consider those rights separately, I must inquire whether

the defendant's user of the roadway of Fetter lane and the plaintiff's passage has been reasonable or unreasonable.

[The learned judge here stated the law and recapitulated the facts bearing on this question. He then proceeded as follows.]

Under these circumstances it appears to me that to carry on the whole of the defendant's operations through the plaintiff's passage was not reasonable. I am unable to see any reason why a large proportion of the old materials might not have been carried down Crame court, or why a much larger proportion might not have been carried down Fleur-de-Lis court, and the inconvenience necessarily created by carrying away rubbish of that character distributed over the whole of the passages which gave access to the site. Further than that, it appears to me that the defendant, having regard to the peculiar difficulties of the case, should have made some different arrangement as to the time during which his operations were carried on. In fact he carried them on during the busiest hours of the day, and took no pains to diminish the inconvenience by carrying them on early in the morning or late at night.

What was the result to the plaintiff of the operations thus carried on by the defendant. Undoubtedly the passage by his house was for a long period of time practically devoted to the defendant's building operations. For exactly how many days it was unsafe to cross that passage I do not know, but certainly for months those operations went on; and it appears to me that they went on in such a manner as to render it exceedingly difficult, if not impossible, for persons coming up from Fleet street on the eastern side of Fetter lane, to obtain access to the plaintiff's premises, and the natural effect would be to drive away persons who might have become customers of the plaintiff, and to render the access to his house so difficult that most persons would abandon passing along that side of the road. And there is some evidence that persons who were in the frequent habit of going to the plaintiff's house as customers ceased to do so during a portion of the time in which these operations were going on.

What then has been the result of these operations to the plaintiff? I have come to the conclusion that the plaintiff has proved that he has sustained considerable loss in his business as a dealer in old curiosities in consequence of the defendant's operations, and although it is very difficult to assess the amount of that loss, I have, sitting as a judge of fact, arrived at the conclusion that he has sustained loss to the extent of £60.

Then arises the question, does this state of circumstances give rise to any legal right in the plaintiff? The cases of *Rose v. Groves*, 5 Man. & G. 613, and *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; s. c., 17 Eng. Rep. 51, appear to me to establish this, that where the private right of the owner of land of access to a highway is unlawfully interfered with, he may recover damages from the wrong-doer to the extent of his loss of profits in his business carried on at that place.

The case of *Rose v. Groves* was a case of an owner of riparian property, and it is referred to by Lord Chancellor Cairns in *Lyon v. Fishmongers' Co.* Lord Cairns also cited some observations of Lord Hatherly, when Vice-Chancellor, in *Attorney-General v. Conservators of the Thames*, 1 H. & M. 1, to this effect: "I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway on the river. The existence of such private right of access was recognized in *Rose v. Groves*. As I understand the judgment in that case, it went not upon the ground of public nuisance, accompanied by particular damage to the plaintiff, but on the principle that a private right of the plaintiff had been interfered with. . . . Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on the land of a private proprietor adjoining the road, and though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." Applying that principle to the present case, it appears to me on the evidence that the access to the plaintiff's door in the passage was interfered with by the acts of the defendant, which I hold to have been unreasonable and therefore wrongful, and, that being so, the cases to which I have referred are authorities for the plaintiff, and show that he is entitled to recover the amount of loss which he has suffered in the business which he carries on upon his property.

But I will consider the case further on the ground of the private injury resulting from the public nuisance. The conditions under which a private person may recover in such a case as that are well expressed in the judgment of Lord Justice Brett, then a member of the Court of Common Pleas, in *Benjamin v. Storr*, L. R. 9 C. P. 406; s. c., 15 Eng. Rep. 231. He said: "The cases referred to upon this subject show that there are three things which the plaintiff must substantiate, beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must show a particular injury to himself beyond that which is suffered by the rest of the public." Now I ask whether in this case the plaintiff has or has not sustained that particular injury from the public nuisance? It appears to me that he has.

The case of *Iveson v. Moore*, 1 Ld. Raym. 486; 12 Mod. 262, is one of great authority. It is reported in numerous books. It has found its way into the various digests of the law, and was cited with approval in *Rickett v. Metropolitan Railway Co.*, 5 B. & S. 156, by the Court of Exchequer Chamber, and the case itself was decided by the Court of Exchequer Chamber. Now, as cited in Comyn's Digest

(5th ed.), vol. 1, p. 278, that case resulted in this, "If A. has a colliery, and B. stops up a highway near it, whereby nothing can pass to his colliery, an action on the case lies; for he ought to be remedied in particular, though it was a highway for all." And accordingly, in *Benjamin v. Storr*, Lord Justice Brett considered that "if by reason of the access to his premises being obstructed for an unreasonable time, and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage." No doubt *Rickett v. Metropolitan Railway Co.*, L. R. 2 H. L. 175, shows that where the obstruction is at a considerable distance and temporary, and the injury which the plaintiff sustains is only in common with a large number of other persons, such a right of action does not arise. But it appears to me that the present case is far more like *Iveson v. Moore* and *Benjamin v. Storr*, than either *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281, or *Rickett v. Metropolitan Railway Co.*, *supra*, and that there is here that particular injury to the plaintiff, resulting from a public nuisance, which is referred to in the cases.

The second condition which is referred to by the Lord Justice Brett in *Benjamin v. Storr*, L. R. 9 C. P. 407; s. c., 10 Eng. Rep. 231, is this: "Other cases," he says, "show that the injury to the individual must be direct, and not a mere consequential injury." Now, I have already considered that point, and the cases to which I have referred seem to show that the injury in this case is sufficiently direct. Lastly, the Lord Justice says: "The injury must be shown to be of a substantial character, not fleeting or evanescent." What is the meaning of those words, "fleeting or evanescent"? It is not perhaps easy to answer the question, but it appears to me that nothing can be deemed to be fleeting or evanescent which results in substantial damage, and that the question therefore is to be answered not by time, but by the effects upon the plaintiff; and accordingly in *Iveson v. Moore*, 1 Ld. Raym. 486; 12 Mod. 262, which, as it appears to me, I am bound to treat as law, I find that the interruption of a highway for a month was deemed a sufficient interference to give the plaintiff a right of action. The result therefore to my mind is this, that even upon the ground of public nuisance, the plaintiff has made out his case, and it follows from what I have already said that he is entitled to judgment for damages to the extent of £60.

[Remainder of opinion omitted.]

BRAYTON v. CITY OF FALL RIVER.

1873. 113 *Massachusetts*, 218.¹

ACTION OF TORT. The evidence introduced by the plaintiff tended to establish the following facts : —

Plaintiff was the owner of a wharf and adjoining land, situated upon a creek in which the tide ebbs and flows, and which is the outlet of a natural stream flowing from the Watuppa Ponds to the sea. Upon said premises the plaintiff carried on the flour and grain business, and had done so for many years, grinding annually from 225,000 to 275,000 bushels of grain, which was brought to him in vessels. Before the commencement of this suit the city of Fall River constructed a system of drains or sewers by which the water over a large tract of land was collected into one channel, and discharged into the head of the creek. The gravel, sand, and sediment carried by the sewers accumulated, and partially filled up the creek in front of plaintiff's wharf. In consequence of the shoaling of the water, vessels bringing grain to the plaintiff frequently ran aground in the creek opposite his land, and were hauled by him to a point as near his elevator as possible, in doing which his tackle was frequently broken and injured. Plaintiff consequently lightered the vessels to get them to his elevator so as to discharge them. The cost of lightering was from one and a quarter to one and a half cents per bushel ; and the time occupied in unloading vessels by lightering was much longer than in unloading them by the elevator. In consequence of the shoaling plaintiff was compelled to employ a smaller class of vessels to bring his grain, thus increasing the rate of freight.

Upon the close of the plaintiff's evidence, the Court ruled, as matter of law, that the action could not be maintained. A verdict was directed for the defendants, and the case was reported to the Supreme Court.

J. M. Morton, Jr., for plaintiff.

T. M. Stetson (J. C. Blaisdell with him), for defendants.

MORTON, J. [After stating the case, and holding that the city authorities had no legal right to so manage their sewers and drains as to create a nuisance, public or private.] The remaining and perhaps most difficult question in this case is, whether the plaintiff has proved such an injury as entitles him to maintain a private action. There is no doubt as to the general rules of law upon this subject. An individual cannot maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public. The only remedy is by indictment or other public prosecution. But if, by reason of a public nuisance, an individual sustains peculiar injury, differing in kind, and not merely in degree or extent, from that which the general public sustains from the same cause, he may recover damages

¹ The statement has been much abridged. Part of the opinion is omitted ; also citations of counsel. — ED.

in a private suit for such peculiar injury. The difficulty usually is in applying these rules, and determining what injuries are peculiar and different in kind from the common public injury. The authorities upon the subject are numerous, but we shall refer only to a few of the cases decided in this State, where the tendency has been to restrict the right to bring a private suit within narrower limits than seem to have been adopted in some of the English cases.

In *Blood v. Nashua & Lowell Railroad Co.*, 2 Gray, 137, the nuisance was a bridge built across a stream in such a manner as to obstruct it, the plaintiff owning and carrying on a saw-mill above the bridge. It was held that the plaintiff could not recover for damages caused by the obstruction of the stream rendering it more difficult and expensive to float logs to his mill, that being an injury suffered by the plaintiff in common with the rest of the public, and differing only in degree and not in kind; but that he might recover for setting back the water on his mills, that being an inconvenience special and peculiar to himself.

In *Brightman v. Fairhaven*, 7 Gray, 271, the obstruction complained of was a bridge across a navigable stream. The plaintiff owned land above the bridge, purchased after the bridge was built, and claimed damages upon the ground that the obstruction prevented the use of his land as a spar yard, and interfered with his access thereto from the sea. But the Court held that as the damages claimed were "such as might be sustained by the other owners of land on the stream by reason of its not being navigable, and tending only to show a general depreciation of the land occasioned by the obstructions in the river," he could not maintain a private action.

In *Willard v. Cambridge*, 3 Allen, 574, the alleged nuisance consisted in the removal of a bridge forming a part of a highway; the plaintiff had a lumber, wood, and coal wharf adjacent to the bridge, and alleged that he was injured in his business, that access to his wharf was destroyed, that his houses occupied by tenants were rendered less desirable, and that he was obliged to abate from his rents in order to keep his tenants. But the Court held that these damages were of the same kind as those caused to all persons who had occasion to use, and who owned property on, the highway leading to the bridge, and were not special or peculiar to the plaintiff so as to furnish a good cause of action.

In *Fall River Iron Works Co. v. Old Colony & Fall River Railroad Co.*, 5 Allen, 221, it was held that if the public nuisance complained of merely caused an obstruction to navigation, the plaintiffs had no private remedy, though the injury sustained by them was, by reason of their proximity to the nuisance, much greater in degree than that sustained by others.

The case of *Harvard College v. Stearns*, 15 Gray, 1, at first view, seems opposed to the plaintiffs' right to maintain this action. There the nuisance consisted in filling up a navigable creek so as to cut off the plaintiffs' access to their land bordering on the creek, and it was held

that the action could not be maintained. But it will be seen that the only damage claimed by the plaintiffs was for the diminished value of their land by reason of the obstruction of the creek, and the Court decide the case upon the narrow ground that the action would not lie solely for this injury. In the opinion the Court say: "No evidence appears to have been offered, or any claim set up or instructions asked of the Court, upon the ground of any particular actual hindrance or delay to the plaintiffs, or obstruction in reference to any case of actual intended use of their land by passing through the creek. The claim was for injury to their land by reason of an obstruction placed in a navigable stream or public way, whereby their land would be rendered more difficult of access and less valuable."

The case at bar would have been like that, if the plaintiff had merely proved that the defendants had obstructed the creek, and that such obstruction had diminished the value of his wharf by making the access to it more difficult.

It follows from the authorities we have cited that the plaintiff cannot maintain a private action for any loss or injury to him arising merely from an obstruction to navigation caused by the defendants. If, for instance, the effect of the defendants' acts had been merely to create a bar across the mouth of the creek, so as to destroy or injure its navigability, the plaintiff could not maintain an action because it was thereby rendered more difficult and expensive to reach his wharf, or because his wharf was rendered less valuable. Those would be injuries of the same kind sustained by all other persons who have occasion to use the creek, or who owned land bordering upon it. But in this case the evidence tended to show that the effect of the sewers had been to fill up the creek directly in front of and adjoining the plaintiff's wharf, so that his vessels which he was accustomed to employ to bring grain to his wharf and elevator could not lie at the wharf on account of the diminished depth of water. We are of opinion that this was an injury special and peculiar to him, for which he may maintain this action. He has a right to the water at his wharf at its natural depth. By the filling up of the creek his use of his wharf for the purposes for which it had been constructed and actually used, was impaired, and he was subject to an inconvenience and injury which was not common to the public. Suppose a person had tipped stones off his wharf, forming a pile which prevented any profitable use of it. It would be an obstruction to the navigation of the creek, and to that extent the injury would be a common one to all the public, but the plaintiff would suffer an injury, in the hindrance of the use of his property, to which no one else would be exposed.

In *Blood v. Nashua & Lowell Railroad Co.*, *ubi supra*, the plaintiff recovered damages because an obstruction in the stream caused the water to flow back upon his mills.

In *Haskell v. New Bedford*, *ubi supra*, the plaintiff was held entitled to recover, among other elements of damage, for injuries of the same

character as those complained of in this case. See also *Stetson v. Faxon*, 19 Pick. 147; *Brewer v. Boston, Clinton & Fitchburg Railroad Co.*, 113 Mass. 52.

Upon the whole case we are of opinion that there was evidence which should have been submitted to the jury, tending to show that the defendants illegally created a nuisance by filling up the creek, and that the plaintiff suffered thereby an injury special and peculiar to himself, for which he is entitled to recover in this action.

Verdict set aside.

JEVESON [IVESON] v. MOOR.

9 William 3. 12 Modern, 262.¹

CASE. The plaintiff declared (see the pleadings, 2 Salk. 730, and 3 Ld. Ray. 436), that he was possessed, for a certain term of years yet to come, of a certain colliery in Dale, near the highway leading from such a place to such a place, *et sic retrorsum*, through which his customers used to come and go, to take and carry away the coals dug out of his said colliery; that on the fourteenth of March, in the ninth year of William the Third, he had two hundred loads of coals there dug ready for sale; and that the defendant, intending to hinder the plaintiff of the benefit of his colliery, and to seduce the customers from the plaintiff's colliery to a colliery of the defendant's near adjacent, after the fourteenth of March, and before the action brought, laid six cartloads of stones and an ash tree athwart the said highway at Dale, within the two bounds aforesaid, and continued them there for two months; *per quod* the plaintiff lost the profit and benefit of his colliery; and also the coals lying on the ground were much damnified, *pro defectu emptorum ex causa prædicta sic impedit et obstruct.*

On not guilty, verdict for the plaintiff; and, upon motion in arrest of judgment, a rule made *Curia advisare vult* indefinitely.

The court argued *seriatim*.

And first, they all unanimously agreed, that this being in a highway, and consequently a public nuisance, no action would lie for it, generally speaking; but if any person had a particular damage, which would distinguish his case from that of all the rest of the king's subjects, they held that an action would lie for him, if he laid his damage specially enough to support his action.

And Gould and Turton, justices, held the plaintiff had done so here, especially it being after verdict.

GOULD, J. This declaration is special enough, even upon demurrer, *a fortiori* after verdict. Indeed, if the plaintiff had only said "*per*

¹ The same case, under the name of *Iveson v. Moore*, is reported more fully in 1 Lord Raymond, 486; and is also reported in 1 Salkeld, 15; Carthew, 451; Comberbach, 480; Comyn, 58; and Holt, 10. — ED.

quod his carriage could not pass that way," that had been bad; because that is a common damage with the rest of the king's subjects; and, at that rate, every one that had occasion to pass that way would have his action, which would beget such a multiplicity of actions as the law will not endure; but here he says, "*per quod* he lost the sale of his colliery;" and that is special. 1 Rol. Ab. pl. 8; 7 Hen. 7, 3; Godbolt, 343. The stopping of a way may be a general or a special damnification; and the question is here, Whether *per quod* has done its office? It is objected, that it does not appear that the plaintiff lost any buyer; but I answer, that when a man lays a special damage to maintain his action, he need not, many times, set forth the precise certainty thereof; as if a master bring trespass for beating his servant, he cannot recover if he do not show a special damage, as loss of service, yet he need only say "*per quod* he lost his service *per magnum tempus*," and that is well enough; for the *quantum* of time there is not traversable. 1 Leo. 136; Hob. 284; 9 Co. 53. In an action for a private nuisance, the plaintiff concluded *ad nocumentum* of his house, without showing *coment*, and good; for it is to recover damages only. So here it is not necessary to instance who the buyers were; for it appears, first, that the coals there were ready for sale; secondly, that the way was stopped, whereby, &c. There is a difference where the damage is the result of one single instance, as loss of marriage, which cannot be but to one single person, there it ought to be ascertained who that person was; but where the damage is complicated of many instances, as here, it is otherwise; and it would be inconvenient if it were not; for it might be impossible to tell who his customers were to have been; and if he had named some and failed in the evidence of proving a loss of any of them, he must have been nonsuited; and he would be so restrained to them mentioned in the declaration, that he could give evidence of none other. But it is otherwise on an indictment for barratry (see 1 Term Rep. 752, 754); you may give more or less particulars in evidence than you have mentioned; because that only raises or lessens the fine, but here it is to have damages from a jury. Secondly, this is against a wrong-doer; in which case this general way of declaring has prevailed in all the courts in Westminster Hall; for there it is not necessary to make a title to the plaintiff further than generally, "that he was possessed, &c." As for depriving one of his common, *vide* 9 Hen. 6, 43, 45; 27 Hen. 6, 1; 1 Vent. 274; Trinity Term, 27, Car. 2, Rol. 1501; 1 Rol. Ab. 63, pl. 31; 1 Cro. 510; 11 Hen. 4, pl. 44 b.; Hilary Term, 8 Will. 3, Rol. 316, in C. B., *Baker v. Moon*; and so is *Hart and Basset's Case*, 2 Jones, 156; Allen, 22; 1 Leo. 236; Style, 107; 1 Vent. 13. Eating grass, *cum averiis*, good, without more.

TURTON, J. An action will not lie without special damage; Br. "*Action sur Case*," 6, "*Nuisance*," 1; Cro. Eliz. 644; 5 Co. *Williams's Case*; Vaughan, 335, 340, 341; 9 Co. *Mary's Case*; 2 Cro. 446; 1 Rol. Ab. 888; 1 Inst. 56; Keb. *Mennell and Saltmarsh's Case*. Secondly, if special damage be sufficiently alleged, the *quantum* of

them is not material. First, here it appears that the plaintiff had a colliery exposed to sale; secondly, that this was the way through which his customers used to come and go; thirdly, that the defendant *malitiosè*, &c., did stop this way; fourthly, that the plaintiff thereby lost the sale of his coals; and he relied upon 1 Rol. Ab. 104. And he said that the verdict would aid it at all events; and for defects cured by verdict he quoted 1 Keb. 847; 2 Saund. 250; 1 Vent. 114, 126; Jo. 125, 232; 1 Rol. Ab. 63; 2 Cro. 565; Cro. Car. 510; 1 Rol. Ab. 88.

ROKEBY, J. This action will not lie without special damages for two reasons: first, because it is a general injury to the whole body of the kingdom, and therefore the action is given only to the king, who is the head. Secondly, because of the multiplicity of actions that would ensue, if every one might have an action that is stopped of this way. But when an action is upon the special damage, it ought to be so certainly alleged, as that the Court may be satisfied that it is a special damage. And here if the *per quod* had been omitted, it had been undoubtedly bad, for that had been but a general injury; and though the *per quod* seems to have two things, viz., the loss of the sale, and also the lessening the value of the coals, yet in truth all is but one, viz., the loss of the profit of his colliery. If there had been a sufficient cause of action without the *per quod*, the uncertain laying damages under the *per quod* would not vitiate. It is not said that any particular person intended to buy, and by reason of this stopping forbore it; and he compared it to the case in 3 Bulstrode, 75, where the plaintiff had laid in his declaration, that he purposed to settle land upon his son, and to let part to tenants; and that the defendant did slander his title, whereby, &c.; and the judgment was arrested, because he had not shown in certain any who had forborne being his tenant upon that account. And suppose the case of *Hart v. Bassett* to be law, it is not like this; for there was an actual damage *in præsentia*, but here is only a potential damage; because it may be the customers would not have come if the way had not been stopped; or if they had come, it may be he had not agreed of the price with them. But it is objected, they could not name their customers, because they could not know them. I answer, it is for that reason they ought not to have damage, because they do not know what damage it has done them; and they would have recovered something for perhaps nothing.

HOLT, C. J. The action will not lie generally. But two questions are in this case: first, whether the plaintiff may have this action in this case generally, in respect of the proximity of his colliery to the highway? Secondly, whether the special damage be so laid as to maintain the action? As to the first, the action will not lie for the proximity; for though the way be more convenient for him than to others of the king's subjects, yet he has no more right to the way than the rest of the king's subjects, and therefore is no more entitled to an action for the stopping generally than another; and this is the reason of *Finiaux*

v. *Hovedon*, 3 Cro. 664. Every man who brings an action for an injury, it must bear proportion to the right which he has ; as where one has common belonging to his house or ground, or a way to his house or ground, 2 Saund. 115. A. seised of a mill in a town, and B. 'seised of another mill in the same town, and a prescription, that inhabitants should come to one or the other of the mills, as they pleased, if inhabitants come to neither they both must join in the action, in respect of the right which is in common ; and an action must always be managed according to the right ; and this highway was made for all the king's subjects.

Secondly, there is no particular damage, for the offence is stopping the highway ; and if the defendant had been indicted for this, the indictment would conclude "*ad commune nocumentum omnium subdit. domini regis per illam viam transeun.* ;" and without doubt the count would have been bad without the *per quod* ; and it is not like the case put by my Brother Gould, of diverting a water-course from a mill ; for the plaintiff had a particular right in the water-course to his mill ; and so was the case of *St. John v. Moody* ; it was for stopping a private way, and the *per quod* did not make the *gît* of the action. But in all general nuisances, where the action is particular, the *per quod* makes the *gît* of the action ; and there it must be made certain. The case of 27 Hen. 8, is law, if rightly understood ; that is, an action will lie, according to Fitzherbert, if special damage be laid, as it was not in that case ; and according to Baldwin, it will not lie without special damage, as that case was ; and so is 1 Inst. 56. And the special damage must be more than hindrance of passages, as falling in, breaking hand, or leg, &c., and I always understood it so. It is objected, that he lost his customers, and that that is particular. I answer, such a precedent overthrows all the books, which agree that damage must be specially alleged ; for the damages must support the action ; and therefore they must show some particular customer whom this stopping hindered to come. As to the case in 1 Rol. Ab. 63, it would be in point, but I have always heard it denied to be law ; and the same author in the case of *Fell v. Brewer*, Roll. Rep. 56, says, that loss of customers is no special damage in such a case ; but where words, &c., in themselves are actionable, such an allegation with a *per quod* is good, in aggravation of damages ; 2 Rol. Rep. 79 ; 1 Rol. Ab. 36 ; 1 Cro. 140 ; 2 Bulst. 276, where one was said to be incontinent, whereby none would marry him, and not good ; but he should name somebody who refused upon that account ; and there is no diversity between the principal case and an action for words which in themselves are not actionable ; for in both cases there must be a special damage. This is like the case of *Paine v. Parterick*, 3 Mod. 289, and *Menel v. Saltmarsh*, 1 Keb. 847. The first case was thus. There was a town which maintained a wherry for all passengers paying toll, and a custom that the inhabitants of the town should pass gratis ; and the person whose ferry it was gave over keeping it, against whom one of the inhabitants brought his action ; the custom was adjudged good, but it was held that the action would

not lie, and that the defendant was only punishable by indictment; and that there was no more special damage to the inhabitants of the town than to any other, by the cesser of the ferry, viz. the not passing; and that passing free was only consequential. In the case of *Menel v. Salt-marsh*, the corn was rotten because he himself could not bring it home; and the case of *Hart v. Bassett*, 2 Jones, 156, is a weak case, but still the declaration there was better than this; for it appears that the plaintiff was a farmer of tithes, and was liable to an action if he suffered the tithes to lie on the land beyond a convenient time; and that he was also put to great expense. If an action be made maintainable for such imaginary damages, it would overthrow the maxim in law, that an action does not lie for a common nuisance; and if the plaintiff cannot tell whose custom he lost, he cannot show that he lost anything; and the action is always in lieu of the loss.

Then the question was, the Court being thus divided, how judgment should be?

And by HOLT, C. J., if the division had been on the first motion in arrest of judgment, before any rule made, the plaintiff must have had judgment; but here is an *adviseare vult* indefinitely, and so judgment cannot be entered without continuances; and while the Court is divided, it continues an *adviseare vult*. If the rule had been temporary and expired, the matter had been at large. But he said a writ of error lay, and therefore there must be judgment one way or other. But let it stay; *et sic pendet*. *Judgment was stayed.*¹

VENARD v. CROSS.

1871. 8 Kansas, 248.²

ERROR from Coffey District Court, where judgment was rendered in favor of defendant.

Ruggles & Plumb, for plaintiff in error.

Martin, Burns & Case, for defendant in error.

BREWER, J. This was an action brought by the plaintiff in the District Court to abate a mill-dam, and perpetually enjoin defendant from maintaining it. Upon the final hearing judgment was rendered for defendant, and the plaintiff brings the case here on error.

Two grounds for relief are alleged in the petition, — first, the flowing, by the erection of the dam, of land owned by plaintiff; and second, the flowing of a ford across the Neosho River, so as to make it impassable, upon which ford and across which river was a public highway

¹ It is said, that by the consent of HOLT, C. J., this case was argued before all the justices of the Common Pleas and barons of the Exchequer at Serjeant's Inn; and they were all of opinion for the plaintiff, that the action well lay. s. c. 1 Ld. Ray. 495.

² Statement and arguments omitted. Only so much of the opinion is given as relates to a single question. — ED.

duly and legally established, and plaintiff's only means of ingress and egress to his lands. To the second of these grounds only, the first being unquestionably good, need our attention be directed; and on its sufficiency hinges the materiality of the testimony rejected. It is claimed "that the injuries and inconveniences complained of by plaintiff are such only as are suffered by him in common with every citizen in the community through which the road runs," and that therefore the injuries being to the public, the public only can maintain an action to restrain them. That the injury complained of is a public nuisance, an obstruction of the public highway, is obvious. That where only that fact appears no private person can maintain an action to abate the nuisance, is equally clear. Where a nuisance or a wrong is public, the public must move to abate, prevent, or punish. When private, the person injured may proceed. Often, however, an injury is both public and private. Then relief may be afforded at the instance of either the injured public or the injured individual. A larceny is committed. The public is wronged by the infraction of its laws and the disturbance of its security, and it may prosecute for the crime. The individual is injured by the loss of his goods, and he may sue to recover them or their value. Both actions may proceed at the same time. So is it with a nuisance. It may be a wrong to the community in general and a particular injury to an individual. This particular injury to an individual enables him to maintain an action. Thus in *Hughes v. Heiser*, 1 Binney, 463, it was decided that where one dams a river that is a public highway, and the plaintiff coming down with rafts is prevented by the dam from descending the river, the interruption is actionable, for it is a consequential injury to his interest and rights of property. In the note to *Ashby v. White*, 1 Smith's Leading Cases, 364, it is said, "There are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another in the kind of injury, though one may be much more injured than another in degree. In such a case the mode of punishing the wrong-doer is by indictment, and by indictment only. Still, if any person have sustained a particular injury therefrom beyond that of his fellow citizens (and differing in kind), he may maintain an action in respect of that particular damnification. Thus, to use the familiar instance put by the text-writers, if A. dig a trench across the highway, this is the subject of an indictment; but if B. fall into it, then the particular damage sustained by him will support an action." Apply these principles to the allegations in the petition. It is alleged that the erection of the dam making the ford impassable obstructs the highway. So far it shows simply a wrong to the public, for which it alone can maintain an action. But the petition goes further and alleges that this highway is plaintiff's "only means of ingress and egress" to his land. Obstructing such highway, therefore, prevents his access to his lands. Here is disclosed a particular injury to plaintiff, one differing not merely in degree but also in kind from that suffered by community in general. It is not that

he uses this highway more than others, but that the use is of a particular necessity to him, affording him an outlet to his farm. It is to him a use and a benefit differing from those enjoyed by the public at large. Obstructing the highway destroys that particular use and benefit. He therefore may maintain his individual action.

[Remainder of opinion omitted.]

Judgment reversed. Case remanded.

WILKES v. HUNGERFORD MARKET COMPANY.

1835. 2 *Bingham's New Cases*, 281.¹

CASE. The declaration alleged, in substance, that there was a public footway or thoroughfare, leading from the Adelphi over divers streets into Craven Court, and thence over Northumberland Passage, and thence over divers streets to Whitehall; also a certain other public footway or thoroughfare, leading from the Strand over divers streets into Craven Court, and thence as aforesaid; that plaintiff was possessed of certain premises, situate partly in Craven Street and partly in Northumberland Passage, in which premises the plaintiff carried on the business of a bookseller, and was accustomed to make profits by the sale of books to persons passing and repassing by his premises, by, through, and along the said thoroughfares; yet defendants, wrongfully and for a long time, kept said thoroughfares leading from the Adelphi to Craven Court and from the Strand to Craven Court shut and closed up; and also kept Craven Court closed; and thereby hindered plaintiff from carrying on his business in as beneficial a manner as he otherwise would have done.

At the trial before Tindal, C. J., it appeared that the plaintiff was a bookseller carrying on business in Craven Street; that a thoroughfare from the Adelphi through Heel Alley, Craven Court, and Northumberland Court to Whitehall and Westminster, passed by his door; that his customers consisted mainly of persons frequenting that thoroughfare; that it had been obstructed by the defendants closing Heel Alley in execution of works authorized by an act, and passengers had been prevented from following that track for a period of about eighteen months, ending with July the 2d, 1833; that the obstruction for the last three months of that period, from April the 2nd to July the 2nd, 1833, was occasioned, not by the erection of the buildings which the defendants were authorized to construct, but by keeping up their hoards after the building was completed; that such continuance of the hoards was unreasonable and unnecessary; and that the loss accruing to the plaintiff in his business of a bookseller from the consequent diversion

¹ Statement abridged. Arguments omitted. — Ed.

of customers who might otherwise have frequented his shop, was £30, being £10 a month. The action was commenced on the 30th of December, 1833.

A verdict having been found for the plaintiff,

Kelly, pursuant to leave reserved at the trial, moved to enter a non-suit, or reduce the damages.

A rule *nisi* having been granted,

Wilde, and *Merewether*, Serjts., showed cause.

Kelly, and *Channell*, in support of the rule.

TINDAL, C. J. It appears to me, that this rule, except as to that part of it which seeks a reduction of damages, must be discharged. This is an action on the case, in which the plaintiff complains of an injury occasioned to him by the obstruction of a right of way; and he puts on record an allegation of specific damage to himself as occupier of a shop by the side of an ancient way through Hungerford Market to Whitehall. The declaration alleges that at the time of the committing the grievance by the defendants there was a thoroughfare leading from the Adelphi along divers streets and courts into Craven Court, and thence along other streets and courts into Whitehall, and thence back again, for all persons at all times; that the plaintiff was possessed of a messuage adjoining the said thoroughfare, in which he carried on the business of a bookseller, and made great gains, by the sale of books to persons passing along the thoroughfare; that the defendants wrongfully kept the thoroughfare closed an unreasonable length of time, and during that time thereby prevented the plaintiff from carrying on his business in as beneficial a manner as he otherwise would have done, whereby the plaintiff was deprived of divers gains which would otherwise have accrued to him; and the jury have found that the defendants did continue the obstruction to the plaintiff's right of way an unnecessary length of time, after the 3d of April, 1833.

The next question is, whether this is such a peculiar and private damage to the plaintiff beyond that suffered by the rest of his Majesty's subjects, as to enable him to sustain an action against the defendants. (And I think, in conformity with the greater number of the decisions, that it was. The injury to the subjects in general is, that they cannot walk in the same track as before; and for that cause alone an action on the case would not lie; but the injury to the plaintiff is, the loss of a trade, which but for this obstruction to the general right of way he would have enjoyed; and the law has said, from the Year Books downwards, that if a party has sustained any peculiar injury, beyond that which affects the public at large, an action will lie for redress. Is the injury in the present case of that character or not? The plaintiff, in addition to a right of way which he enjoyed in common with others, had a shop on the roadside, the business of which was supported by those who passed: all who passed had the right of way; but all had not shops; that is the observation made in *Baker v. Moore*, cited in *Iverson*

v. *Moore*, which was an action for stopping a way and preventing the carriage of coals. In *Baker v. Moore*, the refusal of the plaintiff's tenants to remain on the premises was considered a damage sufficiently peculiar and private to entitle the plaintiff to sue the defendant for having erected a wall across a common way used by the tenants. Indeed, for the most part the only question is, whether the injury to the individual is such as to be the direct, necessary, natural, and immediate consequence of the wrongful act. *Hubert v. Groves* has been relied on on the part of the defendants: but the gravamen there was one which applied equally to all his Majesty's subjects, namely, that they were obliged to go in a more circuitous track, and not one which affected the plaintiff above others: unless that be a sufficient distinction between *Hubert v. Groves* and the present case, I must yield to the greater authority of the other decisions.

[The opinions of Park and Gaselee, JJ., are omitted.]

BOSANQUET, J. . . . As to the second question, whether this injury was so special and particular to the plaintiff as to form the ground of an action, the principle on which the question is to be decided is well acknowledged. The difficulty is in the application, and extreme cases may be put, where it is not easy to draw the line between private injury and public inconvenience. The principle is, that where an individual sustains an injury from a nuisance beyond that which is felt by the public at large, he may obtain redress by an action, although for the public injury the offender can only be proceeded against by indictment.

The injury of which the plaintiff complains is, injury to his business as a shopkeeper; he does not complain of being stopped in passing and repassing as others have been stopped, but that, by the obstruction in question, persons who frequented his shop have been prevented from approach. It may be that others have also been injured in the same way, and a case has been put in argument of every individual shopkeeper in a long line of streets suffering a like injury from the same cause. That extreme case, however, does not resemble the present, in which the peculiar injury is put only as accruing to a single individual.

Several authorities have been cited, and among them, *Hubert v. Groves*, has a strong bearing on the present case, because there it was alleged in the declaration "that the plaintiff, being possessed of a certain messuage, &c., had enjoyed and was entitled to a certain way from and out of the said messuage, &c., through, along, and over a certain street, called Dean Street, for himself, his servants, &c., to pass and repass, and to carry all things necessary for his business, as a coal and timber merchant." And the declaration then stated, "that the defendant had deprived him of all benefit, profit, and use of the said way, by laying large quantities of earth and rubbish, by which the way was totally obstructed, and the plaintiff prevented from enjoying his premises and

carrying on his trade in so advantageous a manner as he had a right to do, and by which the plaintiff was obliged to carry his coals, timber, &c., by a circuitous and inconvenient way." The plaintiff was nonsuited, and the Court of King's Bench, on motion, refused to set the nonsuit aside; we must see, therefore, whether that case has been confirmed, and whether it is supported by the weight of other authorities. Now *Baker v. Moore* is a very strong case, because there the injury complained of was the departure of the plaintiff's tenants from their several occupations in consequence of the defendants having built a wall across a way they were entitled to use. For the mere act of obstruction in passing and repassing the plaintiff probably could not have sued; nor could his tenants themselves, as mere occupiers; but the foundation of the action was, though it rested on an obstruction to passing and repassing, the injury occasioned to the plaintiff by the deterioration of his property. That applies exactly to the present case. And since the decision of *Hubert v. Groves* we have, in the case of *Rose v. Miles*, the deliberate opinion of the Court of King's Bench. The act that occasioned the obstruction there was the mooring of a barge across a navigable creek, and the injury to the individual was the loss and expense occasioned to him by being compelled to convey his goods overland. On that ground he was held entitled to sustain an action. Then in this Court we have the case of *Greasly v. Codling*, which, as the plaintiff (according to the report in *B. Moore*) carried on a trade, is the same in effect as *Rose v. Miles*.

Rule for entering nonsuit discharged.

BLACKWELL v. OLD COLONY R. R. CO.

1877. 122 *Massachusetts*, 1.¹

TORT. The declaration alleged, in substance, that plaintiff was the owner of a parcel of land and a wharf on a navigable river and arm of the sea; that his occupation, among other things, was that of master mariner and coaster, and of buying and selling and transporting in vessels, by water, goods and merchandise to and from his land and wharf, and to and from various ports, and that he used said wharf for landing, shipping, and storing said goods, and for other purposes for which a wharf is commonly used; that plaintiff charged storage on goods landed on said wharf, and in various ways derived a large income from said business; that plaintiff was the owner of the only wharf on the river used for such purposes; that the defendants wrongfully and unlawfully built a bridge, without a draw, across said river, below said land and

¹ Statement abridged. — Ed.

wharf, and between it and the sea, and so low and near the river as to prevent the plaintiff from navigating said river and using said land and wharf as aforesaid; thereby damaging and injuring the plaintiff in his said land and wharf and business.

A demurrer to the declaration was sustained by the Superior Court; and the plaintiff appealed.

G. Marston, for defendant.

F. A. Perry, for plaintiff.

GRAY, C. J. The act of the defendant, for which the plaintiff in various counts seeks compensation, is the building of a bridge across a navigable stream and arm of the sea. The direct injury alleged is to the navigation of the stream, to which the plaintiff is entitled only in common with the whole public; and the remedy for that injury is by indictment, and not by private action. The fact that the plaintiff alone now navigates the stream, or has a wharf thereon at which he carries on business, only shows that the present consequential damage to him may be greater in degree than to others, but does not show that the injury is different in kind, or that other riparian proprietors and the rest of the public may not, whenever they use the stream, suffer in the same way. The case has no analogy to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land, or, being against the front of his land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate, or in which the carrying on of an offensive trade creates a nuisance to the plaintiff. *Blood v. Nashua & Lowell Railroad*, 2 Gray, 137; *Lawrence v. Fairhaven*, 5 Gray, 110; *Brightman v. Fairhaven*, 7 Gray, 271; *Willard v. Cambridge*, 3 Allen, 574; *Wesson v. Washburn Iron Co.* 13 Allen, 95; *Brayton v. Fall River*, 113 Mass. 218; *Lyon v. Fishmongers' Co.* 1 App. Cas. 662.

Judgment affirmed.

WESSON v. WASHBURN IRON CO.

1866. 13 Allen, 95.¹

TORT. The declaration alleged, in substance, that the plaintiff's houses adjacent to defendants' rolling mill were greatly shaken and jarred by the motion of the machinery in the mill; and also that large quantities of coal-dust, smoke, and ashes rose and issued from the mill and entered into and diffused themselves over and through the plaintiff's premises, rendering the plaintiff's houses unfit for habitation.

Upon the trial, plaintiff introduced evidence tending to prove these allegations.

The plaintiff requested the Court to instruct the jury that if her dwell-

¹ Statement abridged. Arguments omitted. — Ed.

ling-house was injured by jarring and shaking, and rendered unfit for habitation by smoke, cinders, dust, and gas from the defendants' works, it was no defence to the action that many other houses in the neighborhood were affected in a similar way. But the judge declined so to rule, and instructed the jury, in accordance with the request of the defendants, that the plaintiff could not maintain this action if it appeared that the damage which the plaintiff had sustained in her estate was common to all others in the vicinity; but it must appear that she had sustained some special damage, differing in kind and degree from that common to all others in the neighborhood.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

G. F. Hoar (*G. F. Verry* with him), for plaintiff.

F. H. Dewey (*E. B. Stoddard* with him), for defendants.

BIGELOW, C. J. [After passing upon exceptions to evidence.] The more interesting question remains to be considered, whether the instructions under which the case was submitted to the jury were correct and appropriate to the facts in proof.

There can be no doubt of the truth of the general principle stated by the Court, that a nuisance may exist which occasions an injury to an individual, for which an action cannot be maintained in his favor unless he can show some special damage in his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, ~~which every subject of the State may exercise and enjoy, such as the use of a highway, or canal, or public landing place, or a common watering place on a stream or pond of water, — in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance. The private injury, in this class of cases, is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals.~~ Several instances of the application of this rule are to be found in our own reports. *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, 19 Pick. 511, 514; *Quincy Canal v. Newcomb*, 7 Met. 276, 283; *Holman v. Townsend*, 13 Met. 297, 299; *Smith v. Boston*, 7 Cush. 254; *Brainard v. Connecticut River Railroad*, 7 Cush. 506, 511; *Blood v. Nashua & Lowell Railroad*, 2 Gray, 140; *Brightman v. Fairhaven*, 7 Gray, 271; *Harvard College v. Stearns*, 15 Gray, 1; *Willard v. Cambridge*, 3 Allen,

574; *Hartshorn v. South Reading*, Ib. 501; *Fall River Iron Works Co. v. Old Colony & Fall River Railroad*, 5 Allen, 224.

But it will be found that, in all these cases, and in others in which the same principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired by the carrying on of offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience, and injury to persons and property thereby occasioned. Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offence would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree but in kind from that which is done to the whole public by the nuisance.

But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offence is committed, not merely by doing an act which causes injury, annoyance, and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

Nor would such a doctrine be consistent with sound principle. Carried out practically, it would deprive persons of all redress for injury to

property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution ; so that in effect a wrongdoer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.

The real distinction would seem to be this: ~~that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution,~~ unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This we think is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause. Certainly multiplicity of actions affords no good reason for denying a person all remedy for actual loss and injury which he may sustain in his person or property by the unlawful acts of another, although it may be a valid ground for refusing redress to individuals for a mere invasion of a common and public right.

The rule of law is well settled and familiar, that every man is bound to use his own property in such manner as not to injure the property of another, or the reasonable and proper enjoyment of it ; and that the carrying on of an offensive trade or business which creates noisome smells and noxious vapors, or causes great and disturbing noises, or which otherwise renders the occupation of property in the vicinity inconvenient and uncomfortable, is a nuisance for which any person whose property is damaged or whose health is injured or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed thereby may well maintain an action to recover compensation for the injury. The limitations proper to be made in the application of this rule are accurately stated in *Bamford v. Turnley*, 3 Best & Smith, 66, and in *Tipping v. St. Helen's Smelting Co.*, 6 Best & Smith, 608-616 ; s. c. 11 H. L. Cas. 642, and cases there cited. See, also, in addition to cases cited by the counsel for the plaintiff, *Spencer v. London & Birmingham Railway*, 8 Sim. 193 ; *Soltau v. De Held*, 9 Sim. (N. S.) 133.

The instructions given to the jury were stated in such form as to lead them to infer that this action could not be maintained, if it appeared that other owners of property in that neighborhood suffered injury and damage similar to that which was sustained by the plaintiff in her estate by the acts of the defendants. This, as applied to the facts in proof, was an error, and renders it necessary that the case should be tried anew.

Exceptions sustained.

CHAPTER XV.

IMMUNITY OF JUDICIAL OFFICERS FROM CIVIL ACTIONS.

FRAY v. BLACKBURN.

1863. 3 *Best & Smith*, 576.

THE declaration stated that heretofore, to wit, on the 28th January, 1862, the defendant, then being one of the judges of her Majesty's Court of Queen's Bench, at Westminster, and the plaintiff then being the plaintiff in a certain action depending in the same Court, in which one Henry Edmund Voules was defendant, and certain costs of adjournment of the trial of the same cause being due to the plaintiff from the last-named defendant, and the plaintiff having theretofore, to wit, on the 15th January, obtained a rule *nisi* of the same Court against the said Henry Edmund Voules for the payment of such costs, which rule came on to be argued before the said defendant hereto as such judge on the said 28th January, when no sufficient cause was shown against making the same absolute. Yet the defendant, so being such judge, well knowing the premises, and not regarding his duty in that behalf, did refuse to make such rule absolute, and, on the contrary thereof, did discharge the same rule with costs, contrary to law; by means of which premises the plaintiff not only has not recovered the said costs so due to her, and amounting, to wit, to the sum of £20, but she is liable to pay the costs so then ordered by the defendant to be paid by her, amounting, to wit, to £10, and the plaintiff has necessarily incurred divers costs and expenses, amounting, to wit, to £20, in and about legal resistance to the last-mentioned order; and the plaintiff has sustained other wrongs and injuries thereby; and the plaintiff claims £50.

Demurrer, and joinder therein.

The points set down to be argued on behalf of the defendant were: First. That no action lies against a judge of one of the superior courts for anything done by him in his judicial capacity, and that it appears by the declaration that the act complained of was so done. Secondly. That the declaration was bad for not alleging malice. Thirdly. That it was defective for not alleging want of reasonable and probable cause.

The case came on for argument on January 27.

Honyman, who appeared in support of the demurrer, was not called upon.

The plaintiff, in person, *contra*, contended that the omission to allege malice was only a ground of special demurrer, and cited stat. 11 & 12 Vict. c. 44, and *The Mirrour of Justices*.

Honyman was not called upon to reply.

Per Curiam. (COCKBURN, C. J., WIGHTMAN, CROMPTON, and MELLOR, JJ.) *Judgment for the defendant.*

Jan. 31st. The plaintiff in person applied for leave to amend by introducing an allegation of malice and corruption. [CROMPTON, J. It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions. In the present case there can be no doubt that the action is most improper and vexatious.]

Per Curiam. (CROMPTON and MELLOR, JJ.)

*Leave to amend refused.*¹

¹ That a judge cannot be questioned in a civil action for any act done by him in his judicial capacity has been settled by numerous *dicta* and decisions, from *Floyd v. Barker*, 12 Co. 23, 24, 25, down to *Kemp v. Neville*, 10 C. B. N. S. 523 (E. C. L. R. vol. 100).

Upon the question whether the action would have been maintainable if the declaration had contained an allegation of malice and corruption, *Honyman* was prepared to cite the following cases: *Floyd v. Barker*, 12 Co. 23, 24, 25; *Barnardiston v. Soame*, 6 How. St. Tr. 1063, 1096; *Dr. Groenvelt v. Dr. Burwell*, 1 Ld. Raym. 454, 468; *Taafe v. Downes*, note to *Calder v. Halket*, 3 Moo. P. C. C. 36; see pp. 51, 58, 60; *Calder v. Halket*, 3 Moo. P. C. C. 28; *Miller v. Hope*, 2 Shaw, App. Ca. 125; see pp. 132, 135, 138, 143, 145; *Gelen v. Hall*, 2 H. & N. 379; *Yates v. Lansing*, 5 Johns. U. S. 282, 290-292, 295; affirmed in the Court of Errors, 9 Johns. U. S. 395; see pp. 424, 432; *Pratt v. Gardner*, 2 Cush. Mass. 63; see pp. 69, 70.

This question was agitated in the recent case of *Thomas v. Churton*, 2 B. & S. 475 (E. C. L. R. vol. 110), where it was held by Cockburn, C. J., Crompton, and Blackburn, JJ., that a coroner holding an inquest on a dead body is not liable to an action for words falsely and maliciously spoken by him in his address to the jury. Cockburn, C. J., however, added, p. 479, "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office, by using slanderous words maliciously and without reasonable and probable cause, he is not to be liable to an action."

PRATT v. GARDNER.

1848. 2 *Cushing*, 63.¹

THIS was an action on the case, in which the plaintiff declared as follows :—

“ For that the defendant, on the fourth day of May, in the year eighteen hundred and forty-seven, at Wales, in our said county of Hampden, was one of our justices of the peace, for our said county, and did then and there wilfully and maliciously issue, under his hand and seal of his said office, a criminal warrant against the plaintiff, directed to the sheriff of our said county, his deputy, or to the constable of the town of Holland, in said county, commanding either of them to apprehend the said Pratt, and bring him before the said justice, or some other justice of the peace, for said county, for trial upon a false and malicious complaint of one Elwell P. Burley, charging the plaintiff with a malicious trespass upon the land of said Burley, in said town of Holland, which said complaint was false, feigned, and groundless ; and which the said defendant well knew to be false, feigned, and groundless ; and upon said false, feigned, malicious, and groundless complaint and warrant, the plaintiff was taken before said Gardner, as one of our justices as aforesaid, according to the precept of said warrant ; and the plaintiff, being thus before said Gardner, the said Gardner did then and there, contrary to his duty and oath as a justice of the peace, and with intent to injure the plaintiff, wilfully and maliciously try, and cause said Pratt to be tried by and before him the said Gardner, upon said false and groundless complaint, without giving time and opportunity to said Pratt to obtain witnesses and proofs favorable to him on said trial, and without giving the plaintiff opportunity to obtain counsel, with which to meet the witnesses against him, and advise him as to his legal rights ; all of which the plaintiff moved, desired, and requested of the defendant to be permitted to do ; and the defendant, wilfully and maliciously and illegally refusing said request, did try said plaintiff upon the said complaint, and did wilfully and maliciously and illegally convict the plaintiff of being guilty of said alleged malicious trespass, of which the plaintiff was not guilty, and of which the defendant well knew that he was not guilty ; and the said defendant did maliciously order the plaintiff to pay a fine of two dollars, and also to pay seven dollars under color of costs ; which said unlawful and malicious sentence the plaintiff refused to comply with ; and the said defendant did then and there maliciously and wrongfully issue his warrant, directing the sheriff of our said county, or his deputy, or the constable of Holland, to carry the said plaintiff to our common jail in Springfield, in our said county, and commanding the keeper thereof to receive and keep said Pratt until he should comply with the sentence aforesaid. And by virtue of said unlawful pre-

¹ Arguments omitted. — ED.

cept, the plaintiff was carried to and imprisoned in said jail for the space of one day, until, to obtain his liberation and freedom, he was obliged to comply with the false, groundless, and malicious order of the said defendant."

The defendant demurred generally to the declaration, and the plaintiff joined in demurrer.

H. Morris, for defendant.

C. Torrey and *W. G. Bates*, for plaintiff.

SHAW, C. J. This cause has not been retained under advisement because the Court entertained any doubt how it must be decided; but presenting, as it does, a question of great importance to the administration of justice, we desired to examine some of the authorities cited in the argument, and we have since had no favorable opportunity to recur to it till recently. The action, we believe, is of the first impression in this Commonwealth, and there is certainly no precedent for maintaining it. The considerations against sustaining it are so numerous and decisive that the difficulty seems to lie in selecting those which are the most weighty and direct, without seeming to disparage others of great importance. It is a principle lying at the foundation of all well ordered jurisprudence, that every judge, ~~whether of a higher or lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiassed convictions, uninfluenced by any apprehension of consequences.~~ It is with a view to his qualifications for this duty, as well in regard to his firmness as to his intelligence and impartiality, that he ought to be selected by the appointing power. He is not bound, at the peril of an action for damages, or of a personal controversy, to decide right, in matter either of law or of fact; but to decide according to his own convictions of right, of which his recorded judgment is the best, and must be taken to be conclusive, evidence. Such, of necessity, is the nature of the trust assumed by all on whom judicial power, in greater or lesser measure, is conferred. This trust is fulfilled when he honestly decides, according to the conclusions of his own mind in a given case, although there may be great conflict of evidence, great doubts of the law, and when another mind might honestly come to a different conclusion. But in a controverted case, however slight may be the preponderance in one scale, it must lead to a decision as conclusive as if the weight were all in that scale.

Now it is manifest that to every controversy there are two sides, and that a decision in favor of one must be against another. And this may extend to every interest which men hold most dear, — to property, reputation, and liberty, civil and social; to political and religious privileges; to all that makes life desirable, and to life itself. If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who, in his turn, might be held amenable to the losing party, and so on indefi-

nately. If it be said, that it may be conceded that the action will not lie unless in a case where a judge has acted partially or corruptly, the answer is, that the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of bystanders or others to prove it; and these proofs are addressed to the Court and jury before whom the judge is called to defend himself, and the result is made to depend not upon his own original conviction, — the conclusion of his own mind in the decision of the original case, — as by the theory of jurisprudence it ought to do, but upon the conclusions of other minds, under the influence of other and different considerations.

The general principle, which excepts judges from answering in a private action, as for a tort, for any judgment given in the due course of the administration of justice, seems to be too well settled to require discussion; and as was said by Mr. Chief Justice Kent, in the case of *Yates v. Lansing*, "has a deep root in the common law." I shall therefore only refer to the case just mentioned, as reported in 5 Johns. 282, and 9 Johns. 395, where the authorities are fully stated and reviewed.

Although there was some difference of opinion in that case, it was upon the point, whether or not the order passed by the chancellor, which was the subject of complaint, was a judicial act, done within his jurisdiction; not whether, if it were within his jurisdiction, he could be called upon to answer for it elsewhere, in a civil action. And we think, therefore, that those who dissented in this case concurred with the opinion of the Court, and with all the authorities, that where the subject-matter and the person are within the jurisdiction of the Court, the judge, whether of a superior or inferior Court, is justified. His judgment may be revised in an appellate court, and reversed or affirmed; but he himself can be liable only to an impeachment for corruption or other misconduct, if there be any. *Mather v. Hood*, 8 Johns. 44; *Cunningham v. Buklin*, 8 Cow. 178. These rules extend as well to a justice of the peace as to any other judicial officer, acting within his jurisdiction, in a judicial capacity.

The only remaining question is, whether the case set forth in the plaintiff's declaration was within the jurisdiction of the defendant as a justice of the peace. Leaving out the epithets "maliciously," "wilfully," "falsely," with which the declaration is so thickly sprinkled, and which cannot change or qualify the material facts, it is stated that the defendant, being a justice of the peace, issued a warrant against the plaintiff, on the complaint of one Burley, charging the plaintiff with a malicious trespass on his land. It is alleged that the complaint was false, feigned, and groundless, and that the defendant knew it; but this was the very question to be tried, and the defendant could not judicially know it till a trial. His private knowledge could not prevent the complainant from having it tried. It is further alleged that the defendant wilfully and maliciously tried and convicted the plaintiff, and sentenced him to pay a fine of two dollars and costs. The plaintiff alleges that he was not guilty, and that the defendant knew he was not guilty.

These are facts which the defendant is not bound to contest with the plaintiff.

The plaintiff avers that this was an unlawful and malicious sentence to pay a fine, which he refused to pay, and that the defendant thereupon maliciously and wrongfully issued a warrant against him, on which he was imprisoned one day, and was then compelled to pay the fine and costs to obtain his liberation. A wilful trespass on land is made the subject of a criminal prosecution and is punishable by fine or imprisonment by the Rev. Sts. c. 126, § 45, and jurisdiction is given to a justice of the peace by § 46, of the same statute.

Here then the justice had jurisdiction, both of the subject-matter and of the person of the party charged with a violation of law, upon proper process duly served. We see nothing in these facts to distinguish this from the ordinary case of a criminal prosecution, where final jurisdiction to try and determine is conferred on a single magistrate. The same strong and repeated qualifying epithets might be added in every case; but as they do not constitute distinct averments to be traversed and put in issue, they cannot alter the legal character of the facts averred.

It is stated in this declaration that the defendant put the plaintiff on trial on this complaint, without allowing him an opportunity to obtain witnesses and proofs favorable to him, and also to obtain counsel to advise and assist him. If this were so, however wrong in itself it might be, it cannot be tried here. Where the subject-matter and the person are within the jurisdiction of the justice, the question of continuance or postponement, for any purpose, is a judicial question, as much as the question whether the party on trial is guilty or not guilty; and the question, whether the magistrate, in the present case, decided upon it correctly, is not to be contested in this suit.

Judgment on the demurrer for the defendant.

WARD v. FREEMAN.

1852. 2 *Irish Common Law Reports*, 460.¹

ACTION against an assistant-barrister for refusing to receive an appeal from a decree which he had made in a Civil-bill Court, — a Court of Record in which defendant acted as judge in deciding cases.

Section 29 of the Civil-bill Act (36 Geo. III. ch. 25) gives any person who shall think himself aggrieved by any decree of the assistant-barrister a right of appeal to the judge of assize. "Which appeal the assistant-barrister is hereby required to receive, and stop all proceedings on the decree or dismiss, the party appealing, if a defendant, first paying the plaintiff the costs allowed by this act, or depositing the

¹ Statement abridged. — Ed.

same with the clerk of the peace, and entering before the assistant-barrister into recognizance for double the sum decreed against him, with costs, in case no relief shall be had on the hearing of such appeal." Then follows the provision in case the appellant shall be a plaintiff. Then by section 31 it is provided, "That no assistant-barrister shall receive any appeal unless the attorney who appeared at the hearing of the cause for the party desiring to appeal shall first make affidavit in writing before such assistant-barrister that such appeal is not, as he believes, made or to be made for the purpose of delay, but that he believes there is reasonable and probable cause of reversing the decree or dismiss."

At the trial plaintiff offered evidence tending to prove the following facts. An action brought by one Cummins against Ward (the present plaintiff) was tried before the defendant while sitting as judge [under the title of assistant-barrister] in the Civil-bill Court; and a decree was made on Friday or Saturday that Cummins should recover certain damages and costs. The Court having disposed of the whole of the civil-bills on Saturday, took up crown business on Monday. Ward's attorney paid the costs on Monday morning; and then on Monday evening, after the crown business was all finished, applied in open court to the defendant to take the appeal. The Court was then sitting, and defendant on the bench. Ward's attorney had the recognizance prepared, with the names of parties and sureties, also the affidavit filled and ready to be sworn, and the sureties were present. Defendant refused to receive the appeal, but assigned no reason. Defendant soon left the bench; the decree obtained against Ward was given out, and Ward's attorney paid the amount to Cummins.

The judge declined to leave the consideration of the case upon the evidence to the jury; but directed the jury to find a verdict for the defendant.

In the Queen's Bench plaintiff's exceptions were overruled, and judgment given for defendant [1 Irish Com. Law Rep. 677].

Upon this judgment a writ of error was brought to the Exchequer Chamber.

Meagher and Lynch, for plaintiff.

Napier, Att'y-Gen., *Fitzgibbon*, and *Concannon*, for defendant.

LEFROY, C. J., CRAMPTON, J., MOORE, J., and GREENE, B., held that the assistant-barrister, acting as a judge of a Court of record, in refusing to receive the appeal acted judicially, and was not therefore responsible in an action for such refusal. MONAHAN, C. J., PIGOT, C. B., TORRENS, J., and PERRIN, J., held that the defendant in so doing acted ministerially. All the judges delivered opinions. Extracts from some of the opinions on this point are given below.

GREENE, B. The ground of action in the present case is the refusal to receive an appeal from a civil-bill decree pronounced by the assistant-barrister, the consequence of which was the issuing of the decree and the seizure of the plaintiff's goods thereunder. Now, it cannot be contended that the right to have an appeal received is an absolute

right; it is only conditional, founded on the performance of certain requisites pointed out by the statute which gives the appeal; amongst others, the making of an affidavit that the appeal is not intended for delay. It is contended that the assistant-barrister, if he had received this affidavit, must have been considered in that particular as acting ministerially; that he had consequently no discretion to exercise as to the taking or refusing it, and therefore that the learned judge was mistaken in saying that the assistant-barrister, when he refused to receive the appeal, was acting, not ministerially but judicially. But I do not think that the plaintiff in error can be allowed thus to pick out from the whole of the proceedings constituting the right to appeal the single ingredient of the taking of the affidavit, discarding from consideration the other matters necessary to create that right. It does not appear either in the pleading or upon the evidence that the recognizance in the present case had been taken, or that the assistant-barrister had decided on the sufficiency of it, or that nothing remained to be done but the swearing of the affidavit. I could understand this argument: that if everything necessary to give the right to appeal had been complied with, save only the swearing of the affidavit, the refusal to administer the oath might be deemed to be the act of an officer merely ministerial; but it is the refusal to take the appeal with which the barrister is here charged. To what description of officer, it may be asked, and in what capacity acting, did the attorney make the application to the assistant-barrister to receive this appeal? It cannot be denied that the person thus applied to was, when the application was made, a judge of a Court of record; that he was, as such, required to do the act, and that he could only as such receive the appeal. Nor can it, as I conceive, be contended that when the application was thus made to him as a judge he had no discretion to exercise nor any judicial functions to perform. It must be admitted that with regard to the amount and sufficiency of the recognizance he had to discharge a duty (which was of a judicial nature) and to exercise a discretion which involved judicial decision. When an application of this nature is made to an assistant-barrister it must be recollected that he is in truth required to adjudicate between the plaintiff and the defendant, — between the latter as claiming the right to obtain a suspension of the decree, and the former as *prima facie* entitled to his execution. I am clearly of opinion that the application to the assistant-barrister to grant this suspension by receiving an appeal was one made to him as a judge of a Court of record, acting in the exercise of his judicial functions as such.

If he had received the appeal, it would have been unquestionably an act by him as a judge, and acting as such; and I am at a loss to see why the refusal to receive it can be viewed in any different light. It is a refusal to do that which, if done, would have been a judicial act. It is the act of a judge exercising jurisdiction in a matter involving judicial functions. Suppose the defendant or his attorney applies to

the judge, and says, "I wish to appeal," and the assistant-barrister replies, "I will not receive your appeal because it is too late," it could not be, and it has not been, denied that such refusal would be a judicial act done by the barrister as a judge, and therefore within the principle of that protection with which the law invests the judicial character. It was decided by the late Serjeant Warren, in the case of *Fox, appellant, King, respondent*, 3 Cr. & Dix, 38, that no action could be maintained against a seneschal for refusing to receive an appeal on the ground that it was too late, although the learned serjeant was of opinion that the reason so assigned was insufficient to warrant the refusal. No legal authority can be cited entitled to greater weight than that of the eminent and lamented gentleman who, after careful consideration, arrived at this conclusion. If, then, the refusal to receive an appeal, accompanied by a reason which is insufficient, be not the ground of an action, because the person complained of was acting judicially, it is difficult to conceive how the nature of his act can be affected by his omitting, as in the present instance, to assign any reason for his refusal. Why is an act, which, if a bad ground be alleged, would not be assailable, to be open to impeachment simply because no reason has been assigned for it?

There is another principle applicable to this case, which is, that if any portion of the thing complained of partake of the nature of a judicial act, it will bring the matter within the protection of the rule, even though other matters may be connected with it which would not be strictly judicial. That principle is established in *Linford v. Fitzroy*, 13 Q. B. 245. That was an action brought against a magistrate for refusing to accept bail from a party charged with an assault. Lord Denman, in giving judgment, says: "It was contended that if the amount of bail, and the ability of the persons tendered was ascertained, the act of admitting to bail became ministerial only. But upon the fullest consideration we are of opinion that the duty of the magistrate in respect to admitting to bail cannot be thus split and divided; that it is essentially a judicial duty, involving inquiries on which discretion must be exercised; and in some cases of misdemeanor, discretion under circumstances of much nicety, and that we cannot lay down a rule which is to depend upon the peculiar facts of each case. The broad line of distinction is this, that unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do anything in execution of that duty, unless he can be fixed with malice, which in this case has been negatived by the jury." It is impossible to allege with any truth that the act, which was the ground of this action, did not partake, to some extent at least, of a judicial character; nay more, that it was not essentially judicial. The Act of Parliament, no doubt, requires the judge to receive the appeal and stop the proceedings, but it also prescribes requisites of the performance of which he must satisfy himself before he does so. Under the circumstances disclosed in this case it appears to me that

the defendant was acting as a judge when called on to receive the appeal, and at the time when he refused so to do; and that the act complained of not only partook of, but was essentially in the nature of, a judicial act.

It is argued, however, on behalf of the plaintiff in error, that supposing and admitting the validity of the principle that a judge is not answerable in any manner for acts done by him in his judicial character, yet here the judicial character of the assistant-barrister had ceased, that he had pronounced his decree, and that thereupon a new and distinct character was attached to him, the nature of which was merely ministerial. I cannot accede in point of law to that proposition. So long as the assistant-barrister continues to preside in the Civil-bill Court his judicial office and character remains. It is in that capacity that he receives an appeal, or can receive it. As I understand the declaration of the plaintiff, there is no room even for the allegation in point of fact that in the present case the proceeding complained of took place after the character of judge had ceased. It will not be denied that the signing the decree was a judicial act; he was then undoubtedly acting in his judicial character. Further, the plaintiff's attorney says that he applied to the defendant in open Court. What is the meaning of that? It means that the defendant was sitting or presiding in open Court as a judge, and that to him as such the application was made.

For these reasons I am of opinion, upon the only question which, in my view of the case, was submitted to the learned judge at the trial, that he was right in point of law in saying that the act in question was a judicial act.

PERRIN, J. I think we overlooked [in the Court below] the real nature of the case and ground of complaint, which is, not that that he erred in opinion or judgment on any of the subjects committed to his decision, or rather to his care, but that he refused to enter on his duty, to put himself in a capacity to form an opinion on any of those subjects which there can be no doubt would have been correct, and for which opinion, though erroneous (on the only matter for the real exercise of judgment, — the sufficiency of the bail), he would not be liable in an action: It is analogous to an appeal lodged with the sheriff. By the statute the sheriff is authorized to take an appeal where the party does not appear in the Court below; and to entitle the party to do so he must deposit the amount of the decree with the sheriff, and enter into a bond, with condition to perform and abide the decree of the judge, and thereupon the sheriff shall stop proceedings on the decree, and give the party a certificate that he has appealed. If a party so circumstanced went before a justice of the peace and asked him to receive the appeal, and the justice refused, could it be said he was exercising a judicial function? If the sheriff refuse to take the bond with a proper condition, could it be said he was exercising a judicial function? In *Taaffe v. Lord Downes*, it was held that the chief justice was exercising a judicial function; and Judge Fox draws the distinction between the act of a judge and an

ordinary justice of the peace. Here the assistant-barrister was exercising powers, not for the purpose of forming his own judgment; he was in the same position as the sheriff. In both cases the civil-bill cause had closed; there was no *lis pendens*. It is enough to rule the question to say the functions of the judge closed with the decree; the subsequent duty was ministerial, and merely ancillary to the appeal or re-hearing before the judge of assize, on whom jurisdiction is conferred. It therefore appears to me that these were ministerial, and merely ministerial, acts; though there was an exercise of the mind in taking the affidavit and deciding the sufficiency of the bail, just as in the case of an appeal lodged with the sheriff, but that mere exercise of judgment will not make the act judicial. In *Midhurst v. Waite*, 3 Burr. 1263, Lord Mansfield says: "It is taking the definition too large to say that every act where the judgment is at all exercised is a judicial act; a judicial act is supposed to be done *pendente lite* (of some sort or other)."

There can be no doubt that an assistant-barrister is a judge of record, and where he is acting judicially, or has a discretion to exercise, no action can be maintained against him, at least without malice expressly charged and distinctly proved. If he had received the affidavit, examined the bail, and adjudged them not qualified, or rejected the affidavit or recognizance as defective in form, no action would have lain against him on the allegation that the bail was well qualified, or that the affidavit and recognizance were perfect in form and free from objection. Acting within his jurisdiction, the assistant-barrister must be respected and upheld; but when he was required to receive the appeal and examine the bail and take the affidavit and recognizance, he was required to do a merely ministerial act; touching it he had no discretion, no judgment to exercise, although requiring some exercise of mind. As to the taking the bail, or its sufficiency, there may be some discretion to exercise; but none as to the taking the affidavit. How could it be judicial? There is no difficulty in separating the act of taking the affidavit of the attorney and the act of allowing the bail to be examined as to their sufficiency, and the act of forming a judgment upon their sufficiency or qualification when examined. It is for the refusal to do the prior act that this action is brought, and which first act is merely ministerial. Where there is a ministerial act to be done by one who on other occasions acts judicially, the refusal to do the ministerial act is equally objectionable as if no judicial functions were on any occasion intrusted to him. There seems no reason why the refusal to do a ministerial act by a person who has certain judicial functions should not subject him to an action in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as a judge as the act when his jurisdiction is exceeded. In the act beyond his jurisdiction he has ceased to be a judge. As to the ministerial act, which may be initiatory to a judicial proceeding, he is not yet clothed with the judicial character. All proper respect is to be

shown to judicial authority ; but authority must be defined, or arbitrary discretion and despotism will be established, and real justice sacrificed to the temper of those who delude themselves into a belief that they are consulting its interests. If then the act was not within the protection of the judicial privilege, it was plainly an unlawful and deliberate refusal to do his duty, and a neglecting of that duty to the prejudice and injury of the party complaining.

PIGOT, C. B. It cannot be sustained in point of law that the assistant-barrister, because he is an assistant-barrister, is exempted from responsibility for refusing to consider the appeal. I hold that an action does lie against him for refusing to undertake the duty of considering the appeal. I do not think it necessary to say whether, after he had entered into the consideration of it, he was acting judicially or not. It is not necessary to determine whether, if he had considered the validity of this affidavit, his duty in so considering it was judicial or ministerial. I am satisfied that the provision of the statute requiring him to undertake the duty makes the undertaking of it obligatory, and so far ministerial, that disobedience of that provision would expose him to an action, without at all affecting the general rule that a judge should not, in doing anything in performance of his judicial functions, be held liable to an action.

PIPER v. PEARSON.

1854. 2 *Gray*, 120.¹

ACTION OF TORT against a justice of the peace residing in Dracut, for assault, battery, and false imprisonment. Answer, that the plaintiff was imprisoned in the county jail, in due process of law, for a contempt of court.

At the trial the plaintiff gave in evidence copies, certified by the defendant, of the following papers : A complaint made to the defendant charging John Russ with an unlawful sale of intoxicating liquors in Lowell, and a warrant issued thereon for the arrest of Russ ; a mittimus issued by the defendant for the commitment of the plaintiff to prison for refusing to testify on the trial of said complaint before the defendant at Lowell concerning sales of intoxicating liquors made by Russ and known to the witness ; and a subsequent judgment of acquittal of Russ by the defendant.

By St. 1848, c. 331, § 4, the exclusive jurisdiction of all crimes and offences committed within the district of Lowell is vested in the police Court of Lowell.

The defendant relied for his justification on the record of the judgment, and contended that no sufficient proof had been adduced to show that his acts were without jurisdiction and void. But Metcalf, J.,

¹ Argument omitted. — Ed.

ruled that the record and mittimus constituted no defence. And to this ruling the defendant, being found guilty, alleged exceptions.

B. F. Butler, for defendant.

H. G. Blaisdell, for plaintiff.

BIGELOW, J. The decision of this case depends on the familiar and well settled rule concerning the liability of courts and magistrates exercising an inferior and limited jurisdiction for acts done by them, or by their authority, under color of legal proceedings.

One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and at the same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions, so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive. But on the other hand, if they act without any jurisdiction over the subject-matter; or if, having cognizance of a cause, they are guilty of an excess of jurisdiction, they are liable in damages to the party injured by such unauthorized acts. In all cases, therefore, where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is whether he has acted without any jurisdiction over the subject-matter, or has been guilty of an excess of jurisdiction. By this simple test his legal liability will at once be determined. 1 Chit. Pl. (6th Am. ed.), 90, 209-213; *Beaurain v. Scott*, 3 Campb. 388; *Ackerley v. Parkinson*, 3 M. & S. 425, 428; *Borden v. Fitch*, 15 Johns. 121; *Bigelow v. Stearns*, 19 Johns. 39; *Allen v. Gray*, 11 Conn. 95. If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case, he thereby becomes a trespasser. 1 Chit. Pl. 210; 19 Johns. 39. See *Clarke v. May*, 2 Gray, 410.

These well-settled principles leave no room for question as to the liability of the defendant in this action. As a justice of the peace for the county of Middlesex he had no jurisdiction whatever to try the complaint against Russ. It was for an offence committed "within the district of Lowell," of which the police court of the city of Lowell had exclusive jurisdiction by St. 1848, c. 331, § 4, and which the justice of said court was legally competent to try and determine. *Commonwealth v. Emery*, Middlesex, 1853. The defendant, therefore, acted wholly without legal authority, and can show no legal justification under any judicial record.

It was urged on the part of the defendant that he had authority to punish the plaintiff for contempt, although he had no jurisdiction to try the principal case before him. But the answer to this suggestion is obvious. The power to punish for contempt is only incidental to the more general and comprehensive authority conferred on a magistrate, by which he is empowered to exercise important judicial functions. It

is to enable him to try and determine causes without molestation, and protect himself from indignity and insult, that the law gives him authority to punish such disorderly conduct as may interrupt judicial proceedings before him or be a contempt of his authority or person. Rev. Sts. c. 85, § 33. But it is only when he is in the proper exercise of his judicial functions that this power can be exercised. If he has no jurisdiction of a cause he cannot sit as a magistrate to try it, and is entitled to no protection while acting beyond the sphere of his judicial power. His action is then extrajudicial and void. His power and authority are commensurate only with his jurisdiction. If he cannot try the case he cannot exercise a power which is only auxiliary and incidental. There can be no contempt, technically speaking, where there is no authority. In the case at bar, the defendant had no more power to entertain jurisdiction of the complaint against Russ than any other individual in the community. Although he acted through mistake, it was nevertheless a usurpation. The plaintiff, therefore, could not have been guilty of contempt toward the defendant in his capacity as a magistrate while trying a cause of which he had no jurisdiction; and the commitment therefor was unauthorized and void.

It was suggested by the counsel for the defendant that there was nothing in the case from which it could be properly inferred that the offence with which Russ was charged was actually committed in the city of Lowell; and that as the defendant, by virtue of his authority as a justice of the peace, had cognizance of offences committed elsewhere in the county of Middlesex which he might well hear and determine in the city of Lowell, the presumption was that he was acting rightfully till the contrary was shown. But there are two decisive answers to this argument. In the first place, the record on its face sets out an offence committed in the city of Lowell. That being a district set apart by statute, in which the police Court has exclusive jurisdiction of criminal offences usually cognizable by magistrates, and the offence being charged as having been committed in Lowell, the record legally imports that it was committed there. 1 Stark. Crim. Pl. (2d ed.) 62; Bac. Ab. Indictment, G. 4.

But in the next place, it was for the defendant to show a complete justification for the alleged trespass; if the record left it doubtful whether he had jurisdiction of the offence it would not avail as a defence to the action. There is a marked distinction in this respect between courts of general jurisdiction and inferior tribunals having only a special or limited jurisdiction. In the former case, the presumption of law is that they had jurisdiction until the contrary is shown; but with regard to inferior courts and magistrates, it is for them, when claiming any right or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction. *Peacock v. Bell*, 1 Saund. 74 and notes; *Mills v. Martin*, 19 Johns. 33, 34. The record in the present case *prima facie* shows a want of jurisdiction in the defendant.

Exceptions overruled.

MITCHELL v. FOSTER.

1840. 12 *Adolphus & Ellis*, 472.

TRESPASS for assault and false imprisonment. Plea, Not guilty, (by statute.)

On the trial, before Tindal, C. J., at the Cambridge Spring assizes, 1839, it appeared that the defendants were justices of the peace for the borough of Cambridge, and relied for their justification on a conviction of the plaintiff for having the words "Licensed to sell spirituous liquors" upon his premises, not being licensed in that behalf. (See stat. 6 G. 4, c. 81, s. 25.) The conviction stated an information against the plaintiff by one of his majesty's officers of excise on the 20th of September, 1836; that plaintiff was thereupon duly summoned to appear and answer the charge on the following 30th; that he did not appear on the 30th in pursuance of the summons, and that defendants, having jurisdiction to hear and determine the said offence, thereupon proceeded to examine into the truth of the charge. The depositions of three witnesses were then set forth, and the summons was recited, which appeared, on the face of the conviction, to have been issued on the 20th. The conviction proceeded to adjudge the plaintiff, in his absence, guilty of the offence charged upon him in the information; and imposed upon him the mitigated penalty of £5. It bore date the 30th September. The jury, by the direction of his lordship, found a verdict for the plaintiff, subject to a motion to enter a nonsuit if this Court should be of opinion that the conviction was good. In the following Easter term a rule *nisi* was obtained accordingly.

B. Andrews now showed cause. By stat. 4 & 5 W. 4, c. 51, s. 19, the justices, before whom any information for the recovery of a penalty shall be exhibited, "are authorized and required to summon every person against whom any such information shall have been exhibited, to appear and plead to, and to attend the hearing of, such information, at a time and place to be named in such summons, which summons shall be served upon every such person or persons ten days at the least before the time appointed in such summons." Here, the summons was on the 20th, and the hearing on the 30th of the same month. The question is set at rest by *Regina v. The Justices of Shropshire*, 8 A. & E. 173 (35 E. C. L. R. 366); (see also *Young v. Higgon*, 6 M. & W. 49;) and there was no appearance of the plaintiff so as to cure the defect in the summons, even supposing that an appearance would have had that effect.

Sir J. Campbell, Attorney-General, and *Storks*, Serjt., *contra*. The interval between the summons and the hearing was sufficient. A long series of authorities have decided that one day is to be inclusive, the other exclusive; *Morley v. Vaughan*, 4 Burr. 2525; *Lester v. Garland*, 15 Ves. 248; and the rule has been adopted by all the courts. Reg. Gen. Hil. 2 W. 4. But if there was any defect or informality in the

process, the conviction is not void on that account. If the plaintiff had appeared at the day prefixed, and urged this objection, and the defendants had adjudged the summons to be sufficient, their judgment could not have been impeached in an action of trespass. *Gray v. Cookson*, 16 East, 13. Their act is of a judicial character; it may be erroneous, but not void. The plaintiff ought not therefore to be in a better condition by reason of his refusal to appear, than if he had appeared and objected to the summons without effect. [Lord DENMAN, C. J. If it had been a question of fact before them, whether ten days' notice had been given, and they had adjudicated upon it, the conviction might not have been absolutely void.] Here they were judges both of law and fact. They had a general jurisdiction over the subject-matter; and the plaintiff might have redressed their error by an appeal to the justices in quarter sessions (7 & 8 G. 4, c. 53, s. 82), who are required to rectify any defect in form in any part of the proceedings. If, upon such appeal, the justices at quarter sessions had quashed the conviction, yet trespass would not have lain against the convicting magistrates. Why, then, should the plaintiff obtain an advantage by omitting to resort to the remedy afforded by the legislature.

LORD DENMAN, C. J. There is a clear want of jurisdiction apparent on the face of the proceedings. The plaintiff had a right to refuse attendance on such a summons; and the defendants, having proceeded to enforce a void conviction by apprehending the plaintiff, are liable to this action. As to the other point, the last decision ought to be adhered to; and according to that, the plaintiff is entitled to have ten whole days between the days of service and of the hearing.

PATTESON, J. We had better abide by the rule laid down by the latest authority, than be continually discussing the same point. Any one who reads the act will see that it was not the intention to drive the party too close for time; for it requires that, besides the summons, notice should also be given to him within one week after the information. The defendants have appointed the hearing one day too soon.

WILLIAMS, J. The defendants must show, not only a general jurisdiction, but also jurisdiction in the particular case. They had no right to proceed, unless they appointed the hearing ten clear days after the service of the summons.

Rule discharged.

HOULDEN v. SMITH.

1850. 14 *Queen's Bench* (*Adolphus & Ellis, New Series*), 841.¹

PATTESON, J. This was an action for trespass and false imprisonment against the defendant, the judge of the County Court in Lincolnshire. The defendant pleaded Not guilty, but not saying "by statute;"

¹ Statement and arguments omitted. — Ed.

also a plea of want of notice of action; but the notice was proved at the trial. The facts appear to be that the plaintiff, being resident in Cambridgeshire, was sued in the County Court at Spilsby in Lincolnshire by special order of the defendant under the 60th section of stat. 9 & 10 Vict. c. 95. The plaintiff was served with the summons in Cambridgeshire, and not appearing, judgment was given against him by default at the court at Spilsby on the 18th August, 1847. A judgment order was served on the plaintiff in Cambridgeshire on the 25th August. A warrant against the goods of the plaintiff within the jurisdiction of the Spilsby Court was issued on the 14th of September, which was transmitted, under the 104th section of the Act (see stat. 15 & 16 Vict. c. 54, s. 5), to the County Court in Cambridgeshire, and returned "no effects." So far the proceedings were all regular. On the 21st September a summons was issued by order of the defendant, calling on the plaintiff to appear at the Spilsby Court on the 7th October, and be examined as to his not paying the debt and costs, and as to his estate and effects. This summons was without jurisdiction; for the section 98, which authorizes the issuing such summons, directs it to be issued by the County Court within the limits of which the party shall then dwell or carry on his business; which in this case was the County Court of Cambridgeshire; for in that county only the plaintiff dwelt and carried on his business during the whole of these proceedings. This summons was served on the plaintiff in Cambridgeshire on the 27th September. On the 7th October the plaintiff did not appear at the County Court at Spilsby; and, the service of the last summons having been proved, the defendant, as judge of the Court, *bond fide* believing that he had power and authority to do so, made a minute in the minute book of the Court, whereby it was ordered that the plaintiff should, for contempt in not attending, be committed to Cambridge gaol for fourteen days. A warrant was made out accordingly; and he was so committed.

That this commitment was without jurisdiction is plain; that the defendant ordered it under a mistake of the law and not of the facts is equally plain; for it is impossible that he could be ignorant that the plaintiff dwelt and carried on his business in Cambridgeshire, the services of all the processes having been proved to have been made there, and the defendant having originally specially allowed the plaint to be made in his Court, within the jurisdiction of which the cause of action accrued, the defendant (the now plaintiff) residing in Cambridgeshire. This case is not therefore within the principle of *Lowther v. The Earl of Radnor*, 8 East, 113, 119, or *Gwinne v. Poole*, 2 Lutw. Appendix, 1560, 1566, where the facts of the case, although subsequently found to be false, were such as, if true, would give jurisdiction, and it was held that the question as to jurisdiction or not must depend on the state of facts as they appeared to the magistrate or judge assuming to have jurisdiction. Here the facts of the case, which were before the defendant and could not be unknown to him, showed that he had not jurisdiction; and his mistaking the law as applied to those facts cannot

give him even a *prima facie* jurisdiction, or semblance of any. The only questions, therefore, are, whether the defendant is protected from liability at common law, being and acting as the judge of a Court of record, in which case the plea of Not guilty would be sufficient; or whether he is protected by the provisions of any statute, and if so, whether he can take advantage of such statute, having omitted the words "by statute" in his plea and the margin of it.

As to the first question, although it is clear that the judge of a Court of record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the Court wrongfully done, not in pursuance of, though under color of, a judgment of the Court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction. Here the defendant had not only no jurisdiction to commit the plaintiff to the gaol of Cambridgeshire, but he had no jurisdiction to summon him to show cause why he had not paid the debt. That summons ought to have been issued out of the County Court of Cambridge.

The case of *Dicas v. Baron Brougham & Vaux*, 1 M. & Rob. 309, was cited; but it is plain that the order of commitment made by the defendant as Lord Chancellor was not without or in excess of jurisdiction; the question was whether it was regular or not, which clearly could not form the subject of an action. *Holroyd v. Breare*, 2 B. & Ald. 473; *Tunno v. Morris*, 2 C. M. & R. 298, s. c. 5 Tyr. 949, and other similar cases, turned on the question whether the person doing the wrongful act was so servant of the defendant as to make him answerable for the act; and it was held that an officer is not such a servant to a judge of the Court: but none of those cases turned on the want of jurisdiction. We cannot therefore hold that the defendant in this case is protected from liability at common law.

Is he then protected by any statute? We find no statute which gives such protection. The statutes 21 Ja. 1, c. 12, s. 5, and 42 G. 3, c. 85, s. 6, enable the defence, when it exists, to be given in evidence under the general issue, but they do not protect a party acting without jurisdiction; and now even that privilege of pleading the general issue only is coupled with this qualification, that the plea must be stated to be "by statute," which words are omitted here.

The judgment must therefore be for the plaintiff.

Judgment for plaintiff.

CALDER v. HALKET.

1840. 3 Moore, *Privy Council Cases*, 28.¹

ACTION of trespass, brought in the Supreme Court of Judicature, at Fort William, in Bengal, to recover damages for the arrest and false imprisonment of plaintiff by defendant, acting as judge of the Foujdarry [Criminal] Court of the Zillah of Nuddeah, in Bengal.

The plaintiff was a British born subject of the English Crown. The Foujdarry Court had jurisdiction only over natives of India.

The police transmitted to defendant depositions relative to a riot. The defendant, being of opinion that plaintiff was concerned in the riot, ordered a Perwannah [warrant] to issue for the apprehension of plaintiff. Upon the authority of the Perwannah, the plaintiff was detained, and kept under surveillance. Plaintiff was ultimately brought before defendant; and, after some days' investigation, admitted to bail; and was eventually bound by recognizance to appear when called upon. No further proceedings were taken against plaintiff.

Subsequently, plaintiff brought this action of trespass. Defendant pleaded the general issue; and also six special pleas, justifying as judge. Plaintiff joined issue on the first plea; and replied *de injuria* to the six special pleas upon which issue was joined. Verdict for plaintiff on all the issues, but with liberty for defendant to move to set the verdict aside upon points reserved.

On the 24th of November, 1835, the several points reserved were argued before the Supreme Court, who were of opinion, that the arrest having taken place under the seal of the Foujdarry Court, and the appellant, being a British-born subject and not amenable to the jurisdiction of the Foujdarry Court of the Zillah, the respondent had failed to support his special pleas. They were, however, of opinion, that under the general issue, the respondent was entitled to avail himself of the protection of the 24th section of the Statute 21st Geo. III., c. 70, which precluded the Supreme Court from holding jurisdiction in the action against the respondent, and accordingly adjudged that the verdict should be entered for the respondent on the general issue, with costs, and costs of motion.

From this judgment the appellant appealed to Her Majesty in Council.

M. D. Hill, Q. C., and *C. Buller*, for appellant.

Spankie, Serjt., *Sir William Follett*, Q. C., and *Greenwood*, for respondent.

MR. BARON PARKE. The material question in this case is, whether the defendant, being a judge of the Foujdarry Court of the Zillah of Nuddeah, was, in that character, entitled to the protection of the 21st Geo. III., c. 70, s. 24, for issuing his order, or Perwannah, and for what was done in obedience to it.

¹ Statement abridged. Arguments omitted. — ED.

This section is as follows: "And whereas it is reasonable to render the provincial magistrates, as well natives as British subjects, more safe in the execution of their office, be it enacted, That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever, exercising a judicial office in the country Courts, for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court."

Three meanings may be attributed to this clause.

First. It may mean that no action should lie against one exercising a judicial office, in the country Courts for any judgment, decree, or order of the Court, whether in a matter in which the Court had a jurisdiction or not, or whether the judge wilfully and knowingly gave judgment or made an order in a matter out of his jurisdiction or not; so that the fact of the existence of a judgment, decree, or order, should preclude all inquiry.

Secondly. It may mean to protect the judge only where he gives judgment, or makes an order, in the *bona fide* exercise of his office, and under the belief of his having jurisdiction, though he may not have any.

Thirdly. The object may have been to put the judges of the native Courts on the footing of judges of the superior Courts of record, or Courts having similar jurisdiction to the native Courts here, protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, but leaving them liable for things done wholly without jurisdiction.

It seems to us, that the first of these constructions is inadmissible. It never could have been intended to give such unlimited power to the judges of the native Courts, and reason points out that the general words of the clause must be qualified in the manner stated in one of the two latter modes of construction.

We think that the third is the right mode, and that the true meaning of the section in question was to put the judges of native Courts of justice on the same footing as those of English Courts of similar jurisdiction. There seems no reason why they should be more or less protected than English judges of general or limited jurisdiction, under the like circumstances. To give them an exemption from liability, when acting *bona fide* in cases in which they had, though mistakenly, acted without jurisdiction, would be to place them on a better footing than English judges or magistrates, and to leave the injured individual wholly without civil remedy; for English judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege; and the justices of the peace, whether acting as such, or in their judicial character, in cases of summary conviction, have no other than that of having notice of action, a limitation of time for bringing it, a restriction as to venue, the power of tendering amends, and of pleading the general issue, with certain advantages as to costs.

This construction is that contended for by the appellant, and to that

extent we think that the appellant is right. But in applying that rule to the facts in evidence in the present case, we think that enough does not appear to make the defendant a trespasser.

We must consider the defendant as being in the same situation as a criminal judge in this country, with the qualification, that he had no jurisdiction over one particular class, viz., the European-born subjects of the British Crown; and the question is, whether he is liable to an action of trespass for causing the plaintiff to be arrested, he being, in reality, exempt from his jurisdiction.

If the particular character of the plaintiff be not taken into consideration, and if the case be treated as if he had been a native subject, there is no doubt that the defendant would have been protected; for it is not merely in respect of acts in Court, acts *sedente curia*, that an English judge has an immunity, but in respect of all acts of a judicial nature, as was decided in the case of *Taaffe v. Downes*; and an order under the seal of the Foujdarry Court, to bring a native into that Court, to be there dealt with on a criminal charge, is an act of a judicial nature, and whether there was any irregularity or error in it or not, would be punishable by ordinary process at law. But the protection would clearly not extend to a judicial act, done wholly without jurisdiction; and it is contended, that this order, with reference to a British-born person, is altogether without jurisdiction, because such person was not answerable to the general jurisdiction of the Court; and the special jurisdiction given by the 53d Geo. III., c. 155, s. 105, did not warrant the mode of proceeding in this case, there being no information or complaint by a native; nor did that section of the statute authorize imprisonment in the first instance.

But the answer to the objection to the defendant's jurisdiction, founded on the European character of the plaintiff, is, that it does not appear distinctly in the evidence, upon which alone we are to act, whatever our suspicions may be, that the defendant knew, or had such information, as that he ought to have known of that fact; and it is well settled that a judge of a Court of record in England, with limited jurisdiction, or a justice of the peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus in the elaborate judgment of Mr. Baron Powell, in *Gwynn v. Poole* (Lutw. App. 1566), it is laid down, that a judge of a Court of record in a borough was not responsible, as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction, or, at least, that he might have been cognizant, but for his own fault; which last proposition Mr. Baron Powell illustrates by a reference to the case of the Marshalsea Court, which had jurisdiction only in certain cases where the King's servants were parties, who being all enrolled, the judge ought to have had a copy of the enrolment, and so would have known the character of the parties. It is true, says Mr. Baron

Powell (speaking of the case of a borough Court), that the cause of action does not arise within the jurisdiction of the Court, as it ought to do; but as the judge cannot know that, except by the plaintiff or defendant, until he knows it, the rule shall be in this case, as in others, "*ignorantia facti excusat.*" Mr. Baron Powell lays down the same rule as to a party: but his opinion in that respect is disapproved of by Lord Chief Justice Willes, in *Moraria v. Sloper*, Willes, 35, but not so far as it relates to a judge or officer.

The like rule has been followed, in the case of magistrates acting under the special powers of Acts of Parliament, who are not liable as trespassers, if they have jurisdiction to inquire into the facts stated before them, and nothing appears on one side or the other to show their want of jurisdiction. *Pike v. Carter*, 3 Bingham, 78; *Lowther v. Earl of Radnor*, 8 East, 113. It is clear, therefore, that a judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; and it lies on the plaintiff, in every such case, to prove that fact.

In the case now under consideration, it does not appear from the evidence in the case, that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact. The point, therefore, which is contended for by the plaintiff does not arise; and it is unnecessary to determine, whether, if distinct notice had been given by the plaintiff to the defendant or proof brought forward that the defendant was well acquainted with the fact of his being British-born, the defendant would have been protected in this case, as being in the nature of a judge of record acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority, given by the statute, which was not complied with, and therefore altogether without jurisdiction.

The only doubt their lordships have had in the consideration of this case is, whether the evidence was sufficient to show that the defendant knew or ought to have known that the plaintiff was a British-born subject. They have had none, that it was competent for the defendant to give his defence in evidence, under the general issue, by force of the Statute 42d Geo. III., c. 85, s. 6, if not at common law.

BRITTAIN v. KINNAIRD.

1819. 1 *Broderip & Bingham*, 432.

TRESPASS for seizing and taking possession of a certain vessel, called the *Phoenix*, and detaining the same, with her masts, &c., and 500 lbs. of weight of gunpowder. Plea general issue. At the trial before

Dallas, C. J., at the sittings after Trinity term, 1819, it appeared that the vessel in question, which was decked, and of the burthen of thirteen tons, was seized by the defendants, as magistrates, under the Bum-boat act, 2 Geo. 3, c. 28. The plaintiff was about to offer evidence, that the vessel in question was not a boat within the meaning of the act, when it was objected by the counsel for the defendants, that the conviction was the only admissible evidence of what the magistrates had determined, and was conclusive as to the subject-matter of that determination. The chief justice coinciding in that opinion, the conviction was put in, and appeared to be a conviction under the stat. 2 Geo. 3, c. 28, for that "the plaintiff unlawfully had in his possession in a certain boat in the river Thames certain stores; to wit, 350 lbs. weight of gunpowder, and 58 lbs. weight of ball cartridges, which had then lately been unlawfully procured from and out of a ship or vessel in the said river Thames." His lordship being of opinion that the conviction was a conclusive defence to the action, directed a nonsuit, reserving the point. Accordingly,

Vaughan, Serjt., on a former day, had obtained a rule *nisi* for a new trial, on the ground that the magistrate had, by the act, no power to take anything but a boat; that he had no right to assume to himself a jurisdiction by calling that a boat which was in truth a vessel; and that he could not, by the terms of his conviction, exclude a party from raising the question on the subject-matter of it: the learned serjeant cited *Davison v. Gill*, 1 East, 64, and *Welch v. Nash*, 8 East, 394, in support of his motion.

Lens, Serjt., now showed cause. The only mode of getting rid of a conviction is by appeal or *certiorari*; as long as a conviction remains unquashed, it is conclusive of the facts stated in it. Whether the subject-matter of this conviction were a boat or not, was the very question to be decided before the magistrate, and upon which his decision was final. Even if the magistrate, contrary to all law and fact, had corruptly stated that to be a boat which was clearly a ship, the plaintiff's remedy would be by information not by action. Had a want of jurisdiction, or other defect, been apparent on the face of the conviction, the case might be otherwise; but while the conviction remains unimpeached, the merits of the case cannot form the subject of inquiry by action.

Vaughan and *Lawes*, Serjts., in support of the rule. The question to be decided, in reality, amounts to this, whether, in cases of summary convictions, where neither appeal nor *certiorari* is allowed, such convictions are to be deemed conclusive of the facts stated in them; and whether the party who feels himself aggrieved is precluded from showing, that the convicting magistrate had no jurisdiction. In such cases, if the party is not allowed to show that the facts, on which jurisdiction is assumed, had no existence, the doors of justice are closed against him. Had the magistrate, then, jurisdiction over this vessel? That he had not, will appear from a perusal of the fifth

section of the act,¹ which gives the magistrate a jurisdiction of a very limited nature. Whether the attention is drawn to that, or any other section, no doubt can exist, that boats alone formed the subject-matter of the jurisdiction intended to be given by the act. The frequent thefts carried on in open boats on the river were the grievances at which this statute was pointed; and this is made still more clear by the statute 54 G. 3, c. 187, s. 22, which enacts, that “forfeited *boats*, instead of being burnt, may be restored or sold.” In the fifth section of the former act, the term *boat* alone is used, “Any *boat* with her tackle,” &c., “to direct such *boat*, with her tackle, &c., to be burnt and destroyed, or restored, &c.” Now the vessel in question was a decked vessel of the burthen of thirteen tons, and registered. Here then the jurisdiction of the magistrate is limited, both as to subject, person, and place; and all such matters must be traversable. Suppose the vessel in question had been a seventy-four gun ship, can it be contended, that the Court would be estopped by the terms of the conviction from receiving evidence of such an excess of jurisdiction? If a magistrate assumes jurisdiction by falsely asserting the fact upon which alone his jurisdiction is founded, such a proceeding may be the subject of inquiry by action. . . .

[Remainder of argument omitted.]

DALLAS, C. J. The general principle applicable to cases of this description, is perfectly clear; it is established by all the ancient, and recognized by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction over the subject-

¹ 2 G. 3, c. 28. “And be it enacted by the authority aforesaid, that it shall and may be lawful for the said master, wardens, and assistants, or such person or persons as they shall from time to time depute and appoint under the seal of their corporation, and for all owners or masters of ships or vessels, either in whole or in part in the said river respectively, or for such person and persons as the said owners and masters, or any seven or more of them, by writing under their hands and seals, shall, for that purpose, nominate, depute, and appoint (and which it shall be lawful for them, from time to time, to do), at any time or times from and after, &c., to stop, search, and detain in some place of safety, any boat which there shall be reason to suspect has any ropes, cordage, tackle, apparel, furniture, stores, materials, or any part of any cargo or lading stolen or unlawfully procured from or out of any ship or vessel in the said river; and also to apprehend and detain, or cause to be apprehended and detained, any person or persons who may be reasonably suspected of having or conveying any such goods, stores, or things in such boat; and such person or persons so apprehended shall be (as soon as conveniently may be) conveyed before one or more justice or justices of the peace for any county, city, division, liberty, or place adjoining to the said river; and if such person or persons shall not produce the party or parties from whom he, she, or they bought or received such merchandises, goods, stores, or things aforesaid, or some credible person, to depose upon oath the sale or delivery thereof, or shall not give an account to the satisfaction of such justice or justices how he, she, or they came by the same; that then the said person or persons so apprehended shall be deemed and adjudged guilty of a misdemeanor; and such boat, with her tackle, apparel, furniture, and loading, shall upon such conviction, be forfeited and disposed of as is hereinafter directed.”

matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject-matter in the present case were a boat, it is agreed that the boat would be forfeited, and the conviction stated it to be a boat. But, it is said, that in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction, by showing that this was not a boat. I agree, that, if he had not jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case? By the Act of Parliament he is empowered to search for and seize gunpowder in any boat on the river Thames. Now allowing, for the sake of argument, that "boat" is a word of technical meaning, and somewhat different from a vessel; still it was matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion. But, it is said, that a jurisdiction limited as to person, place, and subject-matter, is stunted in its nature, and cannot be lawfully exceeded. I agree; but upon the inquiry before the magistrate, does not the person form a question to be decided by evidence? does not the place, does not the subject-matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offence charged, and how could the magistrate decide, but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction, by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and when he has inquired his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves jurisdiction, and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally, and, if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding.

[Remainder of opinion omitted.]

[PARK, J., and BURROUGH, J., delivered concurring opinions.]

RICHARDSON, J. I am of the same opinion; whether the vessel in question were a boat or no, was a fact on which the magistrate was to decide, and the fallacy lies in assuming, that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case for a conviction under the game laws of having partridges in possession; could the magistrate in an action of trespass be called on to show that

the bird in question was really a partridge? and yet it might as well be urged in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case, that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game, without being duly qualified to do so; after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction? In a question like the present, we are not to look to the inconvenience, but the law; but, surely, if the magistrate acts *bonâ fide*, and comes to his conclusion as to matters of fact, according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a *mandamus* to proceed on the investigation. Upon the general principle, therefore, that where the magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged.

Rule discharged accordingly.

GROVE v. VAN DUYN AND STOUT.

1882. 44 *New Jersey Law*, 654.

ON error to the Middlesex Circuit.

This was an action for trespass for assault and unlawful imprisonment. The defendant, Cornelius Van Duyn, pleaded the general issue of not guilty to the declaration, which was in its usual form in trespass, for assault and unlawful imprisonment.

The defendant Charles L. Stout also pleaded the general issue to the said declaration, and gave notice of special matter in evidence under said plea, setting up that he was one of the justices of the peace of the county of Middlesex, and that the following complaint was made before him by Cornelius Van Duyn:—

State of New Jersey, Middlesex county, ss. — Cornelius Van Duyn, administrator of Samuel Van Tilburgh, deceased, of the township of Franklin, county of Somerset, upon his oath complains that on the 1st day of December, 1879, at the township of South Brunswick, in the county of Middlesex, Simeon P. Grove, William H. Grove, Jr., and Jediah Higgins, with force and arms, did enter upon the lands of Samuel Van Tilburgh, deceased, and with force and arms did unlawfully carry away about four hundred bundles of cornstalks, to the value of \$8, and were engaged in carrying other cornstalks from said lands of said Van Tilburgh, deceased; and therefore he prays that the said Simeon P. Grove, William H. Grove, Jr., and Jediah Higgins may be apprehended

and held to answer said complaint and dealt with as law and justice may require.

C. VAN DUYN,
Administrator.

Sworn and subscribed before me this 1st day of December, 1879.

CHAS. L. STOUT,
Justice of the Peace.

Stout, as such justice, thereupon issued his warrant in the ordinary form, directing the said two persons and the said Higgins to be brought before him to answer the said complaint; and such three persons having been arrested by a constable, on such warrant, and being brought before said justice, and having waived an examination, were by him committed to the jail of the county for the cause mentioned in the complaint, to await the action of the next grand jury. Having given bail the next day the persons so arrested were discharged, and thereupon one of them, William H. Grove, Jr., brought this suit in trespass for the above-mentioned imprisonment. At the trial the plaintiff was nonsuited, and to review that judgment this writ of error was brought.

A. V. Schenck and *E. T. Green*, for plaintiff in error.

J. H. Stewart, for defendants in error.

The opinion of the Court was delivered by

BEASLEY, C. J. Most of the general principles of law pertaining to that branch of this controversy which relates to the alleged liability of the defendant in this suit, who was a justice of the peace, are so completely settled as not to be open to discussion. The doctrine that an action will not lie against a judge for a wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, of the judicial office itself; for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this judicial immunity has been conferred by the laws of every civilized people. That it exists in this State in its fullest extent, has been repeatedly declared by our own Courts. Such was pronounced by the Supreme Court to be the admitted principle in the case of *Little v. Moore*, 1 South. 75; *Taylor v. Doremus*, 1 Harr. 473; *Mangold v. Thorpe*, 4 Vroom, 134; and by this Court in *Loftus v. Fraz*, 14 Vroom, 667. To this extent there is no uncertainty or difficulty whatever in the subject.

But the embarrassment arises where an attempt is made to express with perfect definiteness when it is that acts done by a judge and which purport to be judicial acts, are such within the meaning of the rule to which reference has just been made.

It is said everywhere in the text-books and decisions, that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be "the authority of the law to act officially in the particular matter in hand." Cooley on Torts, 417. But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a Court or judge exercising a general authority. Their defect is that they leave out of the account all those cases in which the officer in the discharge of his public duty is bound to decide whether or not a particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instance, the judge, in point of fact and law, has no jurisdiction, according to the definition just given, over "the particular matter in hand," and yet, in my opinion, very plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions. There are certainly cases which hold that if a magistrate in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him, he is answerable in an action for the injury that has ensued. But I think these cases are deflections from the correct rule; they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case; if the Superior Court in which the question arises in a suit against the justice differs with him on this close legal question, is he open, by reason of his error, to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often liable under such conditions, because the higher Court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate. But there are many decisions which, perhaps, without defining any very clear rule on the subject, have maintained that the judicial officer was not liable under such conditions. The very copious brief of the counsel of the defendants abounds in such illustrations. As an example, we may refer to the old case of *Gwynne v. Poole*, 2 Lutw. 387, in which it was held that the justice was justified because he had reason to *believe* that he had jurisdiction, although there was an arrest in an action which arose out of the justice's jurisdiction. This case has been since approved in *Kemp v. Neville*, 10 C. B. (N. S.) 550. Here, if the test of official liability had been the mere fact of the right to take cognizance over the particular matter in hand, considered in the light of strict legal rules, this decision would have been the opposite of what it is. In the same way the subject is elucidated in *Brittain v. Kinnard*, 1 B. & B. 432, the facts being a conviction by a justice of a person of having gunpowder

in a certain *boat*, a special act authorizing the detention of any suspected *boat*; and when the magistrate was sued in trespass for an illegal conviction, it was declared that the plaintiff, in order to show the defendants' want of cognizance over the proceedings leading to the conviction, could not give evidence that the craft in question was a *vessel*, and not a boat, because the justice had judicially determined that point. And in this case likewise, the test of jurisdiction in the magistrate in point of fact and of law, was rejected; an inquiry into the authority by force of which the proceedings had been taken being disallowed for the reason that such question had been passed upon by the magistrate himself, the point being before him for adjudication. The same doctrine was promulgated in explicit and forcible terms by Mr. Justice Field, delivering the opinion of the Supreme Court of the United States, in the case of *Bradley v. Fisher*, 13 Wall. 335, this being his language: "If a judge of a criminal Court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence which it is not, and proceed to the arrest and trial of a party charged with such act, . . . no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the Court held by him, for these are particulars for his judicial consideration, whenever this general jurisdiction over the subject-matter is invoked."

These decisions, in my estimation, stand upon a proper footing, and many others of the same kind might be referred to; but such course is not called for, as it must be admitted that there is much contrariety of results in this field, and the references above given are amply sufficient as illustrations for my present purposes. The assertion, I think, may be safely made, that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case, that thereby, in all cases, he incurs the liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer having general powers of judicature, must, at his peril, pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic. Such a regulation would be applicable alike to all Courts and to all judicial officers acting under a general authority, and it would thus involve in its liabilities all tribunals except those of last resort. It would also subject to suit persons participating in the execution of orders and judgments rendered in the absence of a real ground of jurisdiction. By force of such a rule, if the Supreme Court of this State, upon a writ being served in a certain manner, should declare that it acquired jurisdiction over the defendant, and judgment should be entered by default against him, and if, upon error brought, this Court should reverse such judgment on the ground that the service of the writ in question did not give the inferior Court jurisdiction in the case, no reason can be assigned why the justices of the Supreme Court should not be liable to suit for any

injurious consequence to the defendant proceeding from their judgment. As I have said, in my judgment, the jurisdictional test of the measure of judicial responsibility must be rejected.

Nevertheless, it must be conceded that it is also plain that in many cases a transgression of the boundaries of his jurisdiction by a judge will impose upon him a liability to an action in favor of the person who has been injured by such excess. If a magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an alleged larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer. It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offences, for the conclusive reply would be, that this particular case was not, by any form of proceeding, put under his authority.

From these legal conditions of the subject my inference is, that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is, that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put *at least colorably* under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

The application of the above-stated rule to this case must, obviously, result in a judgment affirming the decision of the Circuit judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were, that the plaintiff, in combination with two other persons, "with force and arms," entered upon certain lands, and "with force and arms did unlawfully carry away about four hundred bundles of cornstalks, of the value," &c., and were engaged in carrying other cornstalks from said lands. By a statute of this State, (Rev., p. 244, § 99), it is declared to be an indictable offence, "if any person shall wilfully, unlawfully and maliciously" set fire to or burn, *carry off* or destroy any barrack, cock, crib, rick or stack of hay, *corn*, wheat, rye, barley, oats or grain of any kind, . . . or any trees, herbage, growing grass, hay or other vegetables, &c. Now, although the

misconduct described in the complaint is not the misconduct described in this act, nevertheless the question of their identity was *colorably* before the magistrate, and it was his duty to decide it; and under the rule above formulated, he is not answerable to the person injured for his erroneous application of the law to the case that was before him.

As to the other defendant, all he did was to make his complaint on oath before the justice, setting forth the facts truly, and for such an act he could not be held liable for the judicial action which ensued, even if such action had been extra-judicial. But as the case was, as we have seen, brought within the jurisdiction of the judicial officer, neither this defendant, nor any other person could be treated as a trespasser for his co-operation in procuring a decision and commitment which were valid in law, until they had been set aside by a superior tribunal.

Let the judgment be affirmed.

PATZACK v. VON GERICHTEN ET ALS.

1881. 10 *Missouri Appeal*, 424.¹

ACTION for false imprisonment. The defendant, Von Gerichten, was a justice of the peace. Upon process duly issued plaintiff was brought before defendant, charged with a criminal offence. On trial of the cause before the justice, plaintiff was found guilty of the offence charged, and was sentenced to pay a fine and costs. The justice issued a warrant to carry out the sentence, under which plaintiff was imprisoned until she was released upon a payment. Under the instructions of the Court, the jury found for the plaintiff. Defendant appealed.

Leverett Bell and *G. E. Bigot*, for appellant.

F. & E. L. Gottschalk, for respondents.

BAKEWELL, J. [After stating the case.] There is no question that Von Gerichten had no jurisdiction to try Mrs. Patzack for the alleged offence. *The State v. Barada*, 49 Mo. 504; *The State v. Schuermann*, 52 Mo. 165; 52 Mo. 429. The duty of the justice was to commit the defendant for trial before the Court having jurisdiction of the offence, as appears by the cases just cited. For this excess of jurisdiction the justice was liable as a wrong-doer. *Truesdell v. Combs*, 33 Ohio St. 186.

Appellants contend that as the justice had jurisdiction for one purpose, the case is not as if the entire proceeding were beyond the powers of the magistrate; that jurisdiction attached, and it is merely a question of erroneous judgment. But we cannot take this view. There was a clear excess of jurisdiction. In *Knowles v. Davis*, 2 Allen, 61, a

¹ Part of case omitted. Statement abridged. — ED.

justice who had authority to entertain the complaint, and after examining defendant, — to require him to give bond to appear at a higher court, — required him to find sureties to keep the peace. It was held that the justice was liable as a tort-feasor for this excess of jurisdiction.

Every judicial officer, of whatever grade, must be careful not to exceed his jurisdiction. He is not exercising the judicial function when, being empowered to enter one judgment, he enters a judgment of an entirely different nature; and it is quite undisputed that when inferior Courts act without jurisdiction, the law gives them no protection. That judges of superior or general authority are exempt from liability, even where they have exceeded their jurisdiction, unless the acts complained of were done maliciously, has been held. *Bradley v. Fisher*, 13 Wall. 335. But it was never heard that any such rule could be applied to shield a justice of the peace. He should resolve all doubtful questions against his jurisdiction. But it is unnecessary to go at length into the doctrine of the subject. The cases will be found cited by Judge Cooley. Torts, 416–420.

It is no defence in the present case to say that the justice had jurisdiction over the subject-matter of the complaint for a purpose entirely different from that of giving judgment against the party accused, and inflicting a punishment. “The power to hear and determine a cause,” says Judge Baldwin, in *United States v. Arredondo*, 6 Pet. 709, “is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action.” *Mitchell v. Foster*, 12 Ad. & E. 472, was an action of trespass for false imprisonment. The defendants, who were justices, had imposed a penalty upon the plaintiff for selling liquor without a license. They had jurisdiction to hear and determine this offence, but proceeded to examine into the truth of the charge on the day named in the summons, which should have been, and was not, ten clear days from the service of the summons. They had misconstrued the statute as to the time required for service. It was contended for the justices in the action of trespass, that, as a day had been fixed in the summons served on plaintiff on which he might have appeared, and there was some authority for the computation of time made by the justices, and as they had a general jurisdiction over the subject-matter, and the error might have been redressed on appeal, the act was of a judicial character, erroneous, and not void. But the Queen’s Bench were unanimously of opinion that defendant must show, not only a general jurisdiction, but jurisdiction in the particular case; and the verdict for plaintiff was sustained.

[Omitting part of opinion.]

Good faith and honesty of purpose in such a case go to mitigate damages, but cannot justify a usurpation of power by either constable or justice.

Judgment affirmed.

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AUSTIN v. VROOMAN AND CHASE.

1891. 128 *New York*, 229.¹

APPEAL from Supreme Court, General Term, Fourth Department.

The defendant Chase was a justice of the peace. Vrooman made a sworn complaint before Chase against Austin, charging him with selling diluted milk in violation of the statute. The justice issued a warrant. Austin was arrested, pleaded not guilty, waived a preliminary examination, and offered to give bail for his appearance at the next grand jury term. This was construed to be, in effect, a request to be tried by jury after an indictment. It is now settled that it is the duty of a justice, upon such offer of bail and such request for jury trial, to accept the bail, bind the accused over to the grand jury term, and proceed no further with the case in the Justice Court. The law is so settled by a recent decision of the Court of Appeals, which had not been made when Austin was brought before the justice. Chase, instead of accepting bail, proceeded to try the accused; and, upon conviction, sentenced him to pay a fine and to be imprisoned until it was paid. The conviction was affirmed at the Court of Sessions; but was reversed by the Supreme Court. Austin, having been imprisoned for a short time under the sentence, brought the present action for false imprisonment. The Trial Court nonsuited the plaintiff. The General Term set aside the nonsuit. The defendants appealed.

J. A. McConnell, for Vrooman.

Watson M. Rogers, for Chase.

Wm. H. Gilman, for Austin.

PECKHAM, J. [After making a statement, of which the above is an abridgment.] In trying the plaintiff, and, upon his conviction, committing him to prison, has the justice rendered himself liable in damages to the plaintiff? He did erroneously decide that he had the right to try the plaintiff, notwithstanding his demand, but has such erroneous decision rendered him as to all future acts a trespasser? The answer depends upon a matter of jurisdiction. It is not a question of jurisdiction to proceed with the trial, notwithstanding the demand, but it is a question of jurisdiction to decide whether he has or has not that right. Manifestly he does not, as a matter of law, acquire jurisdiction to proceed by deciding that he has it, but, being confronted with the question of jurisdiction, has he the power to decide it so far that his erroneous decision that he has it, exempts him from liability on the ground that he has only made a judicial error or an error of judgment upon a question of law which he was bound to decide?

In such a case as this it must be remembered that the justice had, in the first instance at all events, jurisdiction of the subject-matter, viz.:

¹ Statement abridged. Argument and portions of opinion omitted. — *Ed.*

the inquiry into alleged offences against the provisions of this act, and the trial of alleged offenders. He also had jurisdiction of the person of the plaintiff. Full jurisdiction had thus been confided to the justice over subject-matter and person at the time when the plaintiff was arraigned before him. In the absence of a proper demand and the giving of sufficient bail it was the duty of the justice, and his jurisdiction continued, to try the accused. This would seem to be a case where, jurisdiction having thus attached, the decision of the justice to try the plaintiff was only an erroneous exercise of such jurisdiction. It is unlike the case where jurisdiction has never been conferred, and the justice decides to exercise a power that he does not and never did possess. Here, in the course of proceedings which he was forced to entertain, and in the case of one over whose person he has properly acquired jurisdiction, the justice is confronted with the necessity of deciding a question depending upon the construction to be given to a statute, and that question must be decided by him one way or the other before he can take another step in those proceedings which, up to that moment, have been legally and properly pending before him, and over which he has had full and complete jurisdiction. It seems plain that his decision upon the question is one in the course of a proper exercise of the jurisdiction first committed to him, and that his error in deciding that he had jurisdiction to proceed was an error of judgment upon a question of law, and that he is, therefore, not responsible for such error in a civil action. It is unlike the case where a justice of the peace proceeded to try a civil action for assault and battery. *Woodward v. Paine*, 15 Johns. 492. The justice never had in such case obtained jurisdiction over the subject-matter and he could not obtain it by deciding that he had it. The case falls under the principle of law that where a judge never has had jurisdiction over the subject-matter, he acts as a trespasser from the beginning in assuming it, and his decision that he has it is no protection to him. I know it was stated in *Gordon v. Longest*, 16 Peters, 97, in a case where the defendant took the proper steps to remove an action brought against him in the State Court to the United States Court, and where the judge of the State Court persisted, notwithstanding those steps in trying the cause, that every step subsequently taken by the State Court in the exercise of jurisdiction was *coram non judice*. Yet in such a case the question is put whether the State judge would be liable for proceeding with the case in the honest exercise of his judgment. *Lange v. Benedict*, 73 N. Y. 12 at 36. And in a case where a plea of title to real estate is put in before a justice of the peace, which ousts him of jurisdiction, would the justice be liable in case he erroneously decided that he continued to have jurisdiction? This question is also put in the course of the opinion in the case of *Lange v. Benedict*, *supra*, and with, as I think, a leaning on the part of the learned judge toward the position of non-responsibility. The jurisdiction existed in both cases at one period, and it was on account of the steps taken in the course of the proceedings in the cases

that the Court or judge was called upon to say whether his jurisdiction had ceased or not. It seems to me that the erroneous decision of that question did not render the judge liable in either case. Unless the proper steps were taken the judge had power in each case to proceed and try it, and so, although the application to remove is properly made, it is addressed to the legal discretion of the judge upon the papers presented, and a question of law is presented for him to decide. His erroneous decision, while conferring no jurisdiction upon him, is still such a judicial determination of a matter already properly pending before him, and over which, up to that moment, he had jurisdiction, that he must be protected from a civil action in regard to it.

[Omitting part of opinion.]

We are inclined to think that this was not a case for holding the magistrate liable to an action on the part of the plaintiff in the nature of a trespass to recover damages for his illegal imprisonment.

In this case there seems to have been no question but that the justice, in all that he did, acted in entire good faith.

The district attorney appeared for the people before the magistrate, and contended that the magistrate had exclusive jurisdiction to try the case under the particular statute. The justice so decided. The Court of Sessions of Jefferson County, upon appeal, concurred in that construction of the statute, and although the General Term of the Supreme Court came to a different conclusion, in the correctness of which we concur, it is yet manifest that there was at least color for different constructions of the terms of the act. It would be a pretty hard rule which under such circumstances should hold a magistrate liable to be cast in damages for an honest mistake in judgment upon a question of law in a proceeding over which he had jurisdiction up to the moment when he was called upon to decide the question. It seems to us there is no public policy which demands such a measure of liability on the part of inferior magistrates, and we think we are not overruling any case in this or in the old Supreme Court. The rule is clear enough, but in this, as in so many other cases, the difficulty consists in its proper application.

We have, as we believe, properly applied it in this case.

We have also looked at the other questions appearing in the record, the exceptions of the plaintiff taken on the trial, and the rulings of the Court thereon, and we think no error was committed calling for a new trial.

The order of the General Term granting a new trial should, therefore, be reversed and the judgment of nonsuit affirmed, with costs to the defendants in all Courts.

All concur.

Order reversed and judgment affirmed.

WEAVER v. DEVENDORF.

1846. 3 *Denio*, 117.

ERROR to the Herkimer C. P. Weaver sued Devendorf and two others before a justice of the peace and declared against them in case, for that being assessors of the town of Frankfort for the year 1843, they assessed the plaintiff's taxable property at \$1800, and in so doing refused to allow him the benefit of the exemption to which he was entitled as a minister of the gospel; that they estimated his property at a higher rate than that of other taxable inhabitants of the town, and refused to make a deduction from his personal property for debts owing by him though he proved to their satisfaction that he owed such debts, by means of which he was taxed and obliged to pay a large amount, &c. In some of the counts the defendants' conduct was charged to have been wilful and corrupt, and in others careless and negligent. The defendants pleaded the general issue, and the justice after a trial before him, rendered judgment for the plaintiff, which the Common Pleas reversed on *certiorari*. The plaintiff brought error to this Court. The evidence, so far as it is material to the questions of law, is sufficiently referred to in the opinion of the Court.

G. B. Judd, for the plaintiff in error.

E. T. Mursh, for the defendants in error.

By the Court, BEARDSLEY, J. Although the plaintiff may have been a minister of the gospel, still his estate, beyond fifteen hundred dollars in value, was equally subject to taxation with that of other persons. 1 R. S. 387, 388, §§ 1, 4, 5. It is not suggested that his property was short of that amount, so that he was wholly exempt from taxation, and upon the evidence that could not be urged with a show of plausibility; we need not, therefore, inquire what the rule in such a case would be. This plaintiff appears to have been worth some five or six thousand dollars, his real estate, in the town where he resided and in which the question arose, being somewhat more than two thousand dollars in value. It was therefore not a case in which the property of the plaintiff was totally exempt from taxation, and over which the defendants had no jurisdiction whatever, but one in which they were authorized and required by law to make an assessment of the property, even if the owner was a minister of the gospel.

The grounds of complaint on the part of the plaintiff, as far as I can collect them from the return, were twofold; *first*, that no allowance or deduction was made, in assessing his property, on account of his being a minister; and *secondly*, that his property was assessed at a higher rate than that of others, so that he was thereby compelled to bear an undue proportion of the public burthens.

There is no evidence in the case, if the fact were material, to show that the defendants did not allow the exemption claimed to the extent

of fifteen hundred dollars, and if the plaintiff was a minister and entitled to that deduction, we cannot presume against the defendants, who were public officers, that they violated their duty in omitting to make the proper allowance. The presumption is that public officers do their duty, and upon this return it is rather to be inferred that the deduction of fifteen hundred dollars was made. The plaintiff was assessed to the amount of one thousand eight hundred dollars for real and personal property, and which may have been the residue after deducting fifteen hundred dollars, a conclusion very well warranted by the evidence. But in my view of the case, it is not at all material whether the fifteen hundred dollars were or were not deducted by the defendants, or whether the plaintiff's property was assessed at a higher rate than that of others, for in neither event can this action be sustained.

The defendants were assessors of Frankfort, where the plaintiff resided, and as such had jurisdiction over all taxable inhabitants of that town. His real estate in the town exceeded fifteen hundred dollars in value: it was therefore plainly a case in which the defendants had jurisdiction over the property as well as the person of the plaintiff; and it was their imperative duty to ascertain, as far as practicable, the taxable property of the plaintiff, and estimate its true value according to their best information, belief, and judgment. 1 R. S. 389, tit. 2, art. 1, 2. In some particulars the duty of assessors is undoubtedly ministerial; but in fixing the value of taxable property, the power exercised is in its nature purely judicial. With the exception of real and personal estate, the value of which is sworn to as authorized by law (id. 392, 393, §§ 15, 16, 22), the residue is to be valued, estimated, and determined by the assessors. Id. 393, 394, §§ 17, 26. This is emphatically a judicial act. The writ of *certiorari*, at common law, lies only to officers exercising judicial powers, and to remove proceedings of that character. *The People v. The Mayor, &c.*, 2 Hill, 9, 11; *In the matter of Mount Morris Square, &c.*, id. 14, 21, 22. Yet all the authorities agree that this writ lies to remove an assessment, although, as the allowance of the writ is discretionary, the Court, on grounds of public policy and convenience, will ordinarily refuse the writ in cases of this nature. *The People v. The Supervisors of Allegany*, 15 Wend. 198; *The People v. The Supervisors of Queens*, 1 Hill, 195; 2 id. *supra*. The act complained of in this case was, therefore, a judicial determination. The assessors were judges acting clearly within the scope and limit of their authority. They were not volunteers, but the duty was imperative and compulsory; and acting, as they did, in the performance of a public duty, in its nature judicial, they were not liable to an action, however erroneous or wrongful their determination may have been. This case might be disposed of on narrow ground, for there was no evidence to justify the conclusion that the defendants acted maliciously in fixing the value of the property of the plaintiff or of any one else; and surely it will not be pretended

they were liable for a mere error of judgment. But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer, for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power. It of course applies only where the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself. The authorities on this subject are almost innumerable. I shall not attempt to state any of them in detail, but will content myself by referring generally to some of the elementary works and adjudged cases, which will be found fully to sustain the principles I have stated. Browne on Actions at Law, 191 to 200; 1 Chit. Pl. 7th Amer. ed. 89, 209, 210; 2 Saund. Pl. & Ev. 613; 2 Stark. Ev. 7th Amer. ed. 586, 588, 1111, 1112; Broom's Legal Maxims, 40, 48; *Yates v. Lansing*, 5 Johns. 282, affirmed in error, 9 id. 394; *Cunningham v. Bucklin*, 8 Cowen, 178; *Easton v. Callendar*, 11 Wend. 90; *Wilson v. The Corporation of New York*, 1 Denio, 598; *Stowball v. Ansell*, Comb. 116; *Garnett v. Ferrand*, 6 B. & C. 611; Opinion of Chief Justice North in *Barnardston v. Soame*, in the exchequer chamber, 7 St. Tr. 442, and in 1 East, 568, note; Opinion of Burrough, J., in *The Duke of Newcastle v. Clark*, 8 Taunt. 602; Case of *Floyd v. Barker*, 12 Coke, 23; *Evans v. Foster*, 1 New Hamp. 377; *Dicas v. Lord Brougham*, 6 C. & P. 249; *Gwinne v. Poole*, 2 Lutw. 387; *Brittain v. Kinnaird*, 1 B. & B. 432; *Bigelow v. Stearns*, 19 Johns. 39; *Doswell v. Impey*, 1 B. & C. 163.

The judgment of the Common Pleas should be affirmed.

Judgment affirmed.

STEARNS v. MILLER.

1852. 25 Vermont, 20¹

REDFIELD, C. J. This is an action upon the case against the defendants for neglect of duty, in the office of listers of the town of Williston, for the year 1847. The first count in the declaration alleges that the plaintiff was liable to be listed, in that town, that year, for

¹ Statement and arguments omitted. — Ed.

three hundred and fifty acres of land, and no more, and that in proper season, according to the requirements of the statute, he gave in that quantity of land. "But the defendants well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the plaintiff, under color of law, did wrongfully appraise more land than plaintiff owned, &c., to wit, ninety-three acres more." And that numerous taxes were assessed on such list, and plaintiff compelled to pay them. These facts were all substantially proved on the trial, or offered to be proved, which is the same thing. The County Court ruled, that no recovery could be had against defendants unless they acted maliciously and corruptly in the matter, and that, under this declaration, it was not competent to give such evidence. This is the whole case upon the first count.

There is no doubt an important distinction to be made, even in regard to such ministerial officers as listers and town assessors, in regard to the character of their acts, whether they have an actual and absolute discretion and judgment to be exercised in the matter, or the act is merely, and fairly, ministerial. In the latter case, ordinarily, they should be held liable for injuries resulting, from their omission of duty, to individuals. They are bound to know their duty, and when it is plain matter of fact to perform it. Now one of the duties imposed by the statute upon listers is to appraise and set in the list the real estate of the inhabitants and land-owners, in town, "and set the number of acres," "the amount of the appraisal, and the amount per centum to the owners thereof."

Now the amount of the appraisal is undoubtedly a matter of judgment and discretion, and for the exercise of which the party is not to be made liable, except for express or implied malice, which could not in contemplation of law be supposed to exist; unless upon the clearest proofs that the value was over-estimated, without any reasonable or probable cause. When the action is predicated of such a discretionary act, Courts should require the distinct allegation and proof of malicious or corrupt motive in the officer. And that being shown, we do not see how the officer is to be screened, even in a civil action, from the liability to make good all damage resulting to others from such acts.

The exemption of the judges of superior Courts of record, and all judges and justices of Courts of records, rests upon peculiar grounds of policy, perhaps. They will not allow their judgments to be revised in this collateral manner by a jury. But a public inferior officer, whose duties are of a subordinate, and chiefly of a ministerial character, cannot be allowed the same impunity, without altogether overriding the present well-established law upon this subject, both in this country and in England. It is quite possible to put perplexing questions upon this subject, as upon many others, and often difficult to find any satisfactory solution of them. But this class of officers have always been made liable for their omission of express and obvious

matter of fact duties, and for all other injurious misconduct in their office, even in matters of discretion, when it could be shown they acted *malâ fide*.

But we are not prepared to say, that setting the number of acres of land appraised in the list of the owners is anything more, ordinarily, than matter of fact. It may be a fact somewhat more obscure, and difficult of ascertainment, than most others. It may be attended with needless expense to require listers, at their peril, to ascertain with any very nice degree of precision, the quantity of land appraised by them. We think it would be. But we think, after making all due allowance for inaccuracies and oversights, which undoubtedly should be made upon a generous scale, still they must be required to act in good faith, and with common care, and skill, and prudence, and especially when they undertake to change a man's own estimate of his land, and if they do this, either fraudulently, or maliciously, or through want of common care and skill, and damage ensues, they are liable. This was offered to be proved in this case on trial, and, it seems to us, was sufficiently alleged in the declaration. All that was necessary to allege in a case of this kind was, that defendants did the act knowing it to be false, which is fully set forth.

[Remainder of opinion omitted.]

Judgment reversed and new trial granted.

LINCOLN v. HAPGOOD ET ALS.

1814. 11 *Massachusetts*, 350.¹

CASE against defendants, for that, when acting and presiding as selectmen of the town of Petersham, at a meeting duly holden for the election of a representative in May, 1812, they refused the plaintiff's vote there offered, although he was a qualified voter, duly entitled to vote in the said election.

At the trial the jury returned a verdict for the plaintiff, which was taken subject to the opinion of the Court upon questions reserved.

Blake, for plaintiff.

Bigelow, for defendants.

PARKER, C. J. As to the first point reserved for the consideration of the Court, we are of opinion, that the plaintiff had a legal right to vote in the choice of representatives in Petersham. He was an inhabitant of that town and resided there, unless his absence for less than three months, during which time he voted at the April meeting in Belchertown, in the choice of governor and lieutenant-governor, should operate to change his residence. And we cannot think that these facts deprived him of his franchise in his native town.

¹ Statement abridged. Argument omitted. — Ed.

· He went to Belchertown for a specified and temporary purpose; and had frequently done it before, always considering Petersham as his home, and always returning there after a short absence.

With respect to his voting in Belchertown, we know it is the practice in many towns to admit any citizens, otherwise qualified, to vote in the election of governor, although not inhabitants of the town, upon the idea that, as this officer presides over the whole State, every citizen of the State ought to be permitted to vote for him, although notoriously being in the town without any intention of remaining there. Other towns, from a different construction of the Constitution, have permitted persons so situated to vote for senators, and not for governor. Both these practices may be wrong; but we are not now called upon to decide concerning them. The question before us is,—does the act of voting, under these circumstances, by an inhabitant of another town, by permission of the selectmen, deprive him of the right to vote, at another election in his own town, in which he is domiciliated, but from which he has been absent for a few weeks on business? We think it does not, and that the facts proved clearly maintain the plaintiff's right to the privilege of which he was deprived.

But a more difficult question remains: and that is, whether the defendants in this case, who are public officers without reward, and upon whom the difficult task is imposed by law of deciding suddenly upon the qualifications of voters, are liable in damages for an error of judgment only, when they have been guilty of no malice, and have exercised an honest and fair judgment upon the question before them? The case does not impute any corrupt motive, or even any negligence in performance of duty, to the defendants. The presumption therefore must be, that they erred through ignorance.

This is not a new question with us, although it has never been formally decided by the whole Court. In the case of *Gardner v. Ward et al.*, 2 Mass. Rep. 244, *in notis*, which is the first action of the kind in this State of which we have a report, no question appears to have been made by the counsel or the Court, as to the liability of the selectmen if they erroneously decided against the plaintiff's rights, although his vote was rejected in that case upon the ground of his alienage; a point which honest and well informed men, not lawyers, might determine wrongly with the best possible motives.

In a like case, which occurred the succeeding year in the same county (*Kilham v. Ward et al.*, 2 Mass. Rep. 236), we find this objection to the action in the argument of the counsel; but no reply to it from the other side, and no notice taken of it by the Court: from which we may infer, that it was not much relied on as an important point in the cause.

Since that time however, actions of this kind having multiplied in all parts of the Commonwealth, in consequence of an increased interest in the elections, it has become a matter of serious consideration, whether the selectmen of towns, acting fairly in discharge of a duty

imposed upon them by law, shall be exposed to actions for a mere mistake of the law, or misapprehension of facts: whether in truth they are not to be viewed as judge, and so entitled to the common privilege of the judicial character not to be punished, or to be responsible in damages, for any consequence of a judgment merely erroneous.

I confess I have for some time maintained the affirmative upon this question, and have, in one or two instances at *nisi prius*, given this opinion, reserving a right to the plaintiffs to have the question decided by the whole Court. But long reflection upon the subject, and the reasoning of those of my brethren, who have inclined to the opposite opinion, have finally satisfied me that I was mistaken; and that, however hard such an action may be against selectmen, it is essential to the rights of the citizen that it should be sustained.

The right of voting, in such a government as ours, is a valuable right: it is secured by the Constitution: it cannot be infringed without producing an injury to the party: and although the injury is not of a nature to be effectually repaired by a pecuniary compensation, yet there is no other indemnity which can be had. In such a case, as in the case of an injury to the reputation, and sometimes to the feelings, the good of society, and security against a repetition of the wrong, require that the suffering party should be permitted to resort to this mode of relief.

The selectmen of a town cannot be proceeded against criminally for depriving a citizen of his vote, unless their conduct is the effect of corruption, or some wicked and base motive. If then a civil action does not lie against them, the party is deprived of his franchise without any relief: and has no way of establishing his right to any future suffrage. Thus a man may be prevented, for his life, from exercising a constitutional privilege, by the incapacity or inattention of those who are appointed to regulate elections.

The decision of the selectmen is necessarily final and conclusive as to the existing election. No means are known, by which the rejected vote may be counted by any other tribunal, so as to have its influence upon the election: or at least no practice of that kind has ever been adopted in this State. There is therefore not only an injury to the individual, but to the whole community: the theory of our government requiring that each elective officer shall be appointed by the majority of the votes of all the qualified citizens who choose to exercise their privilege.

Now if a party duly qualified is unjustly prevented from voting, and yet can maintain no action for so important an injury, unless he is able to prove an ill design in those who obstruct him, he is entirely shut out from a judicial investigation of his right: and succeeding injuries may be founded on one originally committed by mistake. He may thus be perpetually excluded from the common privilege of citizens, without any lawful means of asserting his rights, and restoring himself to the rank of an active citizen. Such a doctrine would be

inconsistent with the principles and provisions of our free Constitution, and must give way to the necessity of maintaining the people in their rights, secured to them by the form of their government.

This principle has not been perhaps precisely settled in England: although I apprehend, in the case of *Ashby v. White*, 2 L. Raym. 938, the principle, upon which this action is to be maintained, was fully recognized by Lord Holt, and afterwards by the House of Lords, who reversed the judgment given by the three other judges of the King's Bench, against the opinion of that eminent judge. The argument upon which that case turned was that an actual injury had been done, and that it was inconsistent with the character of the English laws, that there should be no remedy for a subsisting injury. No question seems to have been made in that cause of malice in the returning officer: probably none was suggested. But the officer was finally holden to be answerable in an action on the case, on the mere ground that he had refused to receive the vote of a subject, who was entitled to vote. This is exactly the present case: although perhaps we are not authorized to say, that malice, or fraud, or corruption was not proved in the case. But it does not appear, that any such motive was considered by the judge, as influencing the determination.

In a later case however of *Drewe v. Coulton*, cited in a note to the case of *Harman v. Tappenden et al.*, 1 East, 563, Mr. Justice Wilson nonsuited a plaintiff in such an action, because it did not appear that the defendants acted maliciously. The nonsuit being acquiesced in by eminent counsel, it is fair to suppose that an action of the case cannot now be maintained in England, for rejecting a vote, unless the injury is proved to have been done maliciously.

But in England another remedy exists, which does not exist with us. The electors there all vote *viva voce*; their names are taken down by the returning officer, as well those whose votes are received as those who are not permitted to vote, and also the name of the candidate for whom they would vote: of which a return is made to the House of Commons. There a revision by a committee takes place, and the rejected vote is counted, and has its effect upon the election, if it was unlawfully rejected. But with us there is no such remedy; and without an action there is no remedy at all, either for the immediate or any subsequent election.

But notwithstanding we deem it necessary that this action should be supported, as the only mode of ascertaining and enforcing a right which has been disputed, we do not think it ought to be a source of speculation to those who may be ready to take advantage of any injury, and turn it to their profit, to the vexation and distress of men, who have unfortunately been obliged to decide on a question sometimes intricate and complicated, but who have discovered no disposition to abuse their power for private purposes. And we therefore think that juries should always, in estimating the damages, have regard to the disposition and temper of mind discoverable in the act complained of:

and probably the Court would determine that a sum, comparatively not large, would be excessive damages in a case, where no fault but ignorance or mistake was imputable to the selectmen.

On the other hand in cases in which it should be apparent that there was a wilful deviation from duty, and a wanton rejection of a vote, from party motives, or from personal hostility to the citizen whose vote is refused, or even a negligent or inattentive examination of his claim, exemplary damages would be required as a compensation to the injured party, and an expiation of the high and aggravated offence against the civil and political privileges of the citizen.

Upon the whole, we see no better way than to leave cases of this kind to the jury, under the direction of the Court: nor have we any doubt that a correct public sentiment will apply the remedy in each case, proportionately to the offence: so that, on one hand, a man who has been, without any fault of his own, deprived of a valuable privilege, should find indemnity and protection in the laws; and on the other, that men who are in places of public trust should not be subject to too severe a penalty, for an involuntary failure in a proper performance of their duty.

Judgment on the verdict.

BEVARD v. HOFFMAN.

1862. 18 *Maryland*, 479.¹

BARTOL, J. The plaintiff in this case, as shown by the record, was a citizen of Carroll County legally entitled to vote at a Presidential election held in that county; the defendants were judges of election duly appointed, commissioned, and qualified, and acting as such. The declaration charges that the defendants "then and there refused to receive from the plaintiff the ballot which he was authorized by law to cast at said election, and to deposit the same in the said ballot box, and then and there refused to permit the plaintiff to vote at said election." The defendants demurred to the declaration, thus raising the question, whether the matters therein alleged are sufficient in law to entitle the plaintiff to maintain his action. In some aspects this question is one of great interest and importance; the right alleged to have been violated is justly esteemed as one of the most precious and valuable belonging to the citizen. In our State, where almost every public officer is chosen by the votes of the people, the right of suffrage cannot be too highly prized or too carefully protected. At the same time the nature of our institutions equally demands, that public officers, acting faithfully and honestly in the discharge of their duties, and within the limits of their constitutional powers, shall be protected from liability

¹ Statement and arguments omitted. — ED.

for mistake or errors of judgment from which none are exempt; provided they are unmixed with fraud or corruption. In this case no fraud or corruption is charged in the declaration, but the appellant contends, that his right of suffrage being conceded, the defendants are liable to him for damages for depriving him of that right, no matter how innocently they may have acted in the matter.

In passing on this question we deem it proper to premise, that the office held and exercised by the defendants, was, in its nature, judicial; the law having necessarily confided to them the duty of exercising judgment in the discharge of their functions. In such a case, this Court is of opinion, the officer cannot be held legally responsible for anything more than an *honest and faithful exercise of his judgment*, and is not liable for the consequences of mistakes honestly made. Although the authorities on this point are not entirely harmonious, the conclusion stated seems to be best supported by them, as well as by good reason and sound public policy.

The cases cited by the appellant, which appear most strongly to support the opposite conclusion, were *Ashby v. White*, 2 Ld. Raymond, 938; and *Lincoln v. Hapgood et al.*, 11 Mass. 350. The decisions in those cases assert the principle, that a party who, like the plaintiff, has been deprived of a right, is thereby injured and must have his remedy. It seems to us that the error of the application of that principle to this case, consists in a misapprehension of what is the right of a citizen under our election laws. In one sense, if he is a legal voter, he has the right to vote, and is injured if deprived of it; but the law has appointed a means whereby his right to vote is decided, and for that purpose has provided judges to determine that question, and has also provided the most careful guarantees for a proper discharge of duty by the judges, by the mode of their selection and their oaths of office. In all governments, power and trust must be reposed somewhere, all that can be done is to define its limits, and provide means for its proper exercise. When the act in question is that of a judicial officer, all that the law can secure is a guarantee, that they shall not with impunity do wrong *wilfully, fraudulently, or corruptly*. If they do so act, they are liable both civilly and criminally; but for an error of judgment, they are not liable either civilly or criminally. If the citizen has had a fair and honest exercise of judgment by a judicial officer in his case, it is all the law entitles him to, and although the judgment may be erroneous, and the party injured, it is "*damnum absque injuria*," for which no action lies.

This, in our opinion, is the most reasonable rule, and it will be found supported by the weight of authority, both in England and in this country.

Judgment affirmed.

CHAPTER XVI.

JOINT WRONGDOERS.¹

SECTION I.

*Who are Joint Wrongdoers.*COLEGROVE v. NEW YORK & HARLEM R. R. CO., AND
NEW YORK & NEW HAVEN R. R. CO.1857. 6 Duer (*N. Y. Superior Court*), 382.²

THIS action is brought against two railroad companies (the Harlem Co. and the New Haven Co.) to recover for damages sustained by the plaintiff, while a passenger on the cars of the Harlem Co., from a collision between the trains of the two companies. Plaintiff contended that the collision occurred by reason of the agents of each company managing its train negligently. By statute, the New Haven Co. was authorized to use part of the road already constructed by the Harlem Co., under such rules as the two companies might agree on; and the two companies had agreed to run their cars on this common road under the rules adopted by the Harlem Co. At the close of plaintiff's evidence, the New Haven Co. moved to dismiss the complaint on the ground, "that no joint action could be maintained against the two companies, the defendants in this action, without proof of a joint act of negligence or concurrence in such joint act, which was not pretended." The motion was denied.

The jury were instructed. that, if they found negligence on the part of both defendants, the plaintiff would be entitled to recover against them jointly for that negligence.

The Court submitted to the jury the following question:—

"Were the defendants, the two companies, or either of them, by their agents, guilty of any negligence, which caused the injury to the plaintiff; and, if only one of them, which?"

To this question the jury answered, "Both."

¹ As to whether one wrongdoer can claim indemnity or contribution from another wrongdoer, see authorities in Keener's Cases on Quasi-Contracts, 492-504; also *Adams v. Jarvis*, 4 Bingham, 66, and *Churchill v. Holt*, 131 Mass. 67. — ED.

² Statement abridged. Only so much of the case is given as relates to one point; and only portions of the opinions on that point. — ED.

The jury rendered a general verdict for \$450 against both defendants.

John Graham, for plaintiff.

Charles W. Sandford, for Harlem Co.

William Curtis Noyes, for New Haven Co.

BOSWORTH, J. [Omitting part of opinion.] The defendants, together, caused the collision. If each company had done the acts it did, with intent to produce the collision, then, I presume, there would be no question that a joint action would lie at the suit of any party damaged directly by it. But in that case, the collision would be no more the joint act of the two than it was in the present case. On the one supposition, the result produced, that is, the collision, was intended by both; on the other supposition, it was not intended by either. If liable jointly in the former case, and not in the latter, it must be for the reason that in the one the intent to do what was done creates a joint liability, and in the other, the absence of any such intent makes the liability several.

But when a party does a wrong which causes an injury, he is liable for the consequences, whether he intended to injure any one or not. A person who negligently performs a duty, and by such negligence injures another, is guilty of a wrong, so far as the rights and remedies of parties in civil actions are concerned. When a person is prosecuted in order to recover from him the damages which his negligence has caused to another, it is no defence that negligence, or a purpose to injure, was not intended.

In this case, it is impossible to ascertain what portion of the injury was caused by the negligence of one defendant, and what portion by that of the other. The negligence of each co-operated with that of the other, and the concurring contributory negligence of both was the direct, and immediate, and sole cause of the collision, or, in other words, caused the injury.

If two persons, driving each his own carriage on a public highway in opposite directions, come in collision in consequence of each having been guilty of such negligence that neither could recover of the other, and a third person, not in either carriage, without any fault or negligence on his part, is injured by the collision, can it be doubted that he may sue the parties jointly and recover?

The injury was caused by a single act. It was caused directly by the joint action of the two; not by action had in pursuance of a common intent to cause a collision, but by action to which each was, in fact, a party.

There would seem to be no considerations of public policy or of justice to either of the defendants, requiring several actions to be brought if it be conceded that each is liable, and to precisely the same extent. The injury is single, and the immediate cause of it is a single act. The same evidence that establishes the liability of one, on such a state of facts as the jury have found, establishes that of the other.

It is true, there might be a recovery against one without proving any negligence of the other, or although negligence of the other might be disproved.

If but one was guilty of negligence, when the complaint charges that the injury was caused by the concurring negligence of both, and for that reason the one free from fault is free from liability, he must be acquitted. He incurs no more hazard of not obtaining a verdict according to the evidence than any one sued with others in any action of tort does, whom the evidence is insufficient to convict of a direct or actual participation in the wrong charged: See *Fosgate et al. v. Herkimer Manufacturing and Hydraulic Co., and others*, 2 Kern. 580.

In a case like the present, and on such facts as have been proved in it, I think it may be said that the collision, and not the mere negligence of the defendants, is the cause of action and ground of the defendants' liability.

It has been decided that if A. accidentally drive his carriage against that of B., and the latter or his carriage is injured, trespass will lie. *Leame v. Bray*, 3 East, 599. So, if he drive it against one in which B. is sitting, to the injury of his person, though the latter carriage was not his property nor in his possession. 7 Taunt. 698.

When a person is directly injured by the forcible act of another, trespass for the forcible act is a proper remedy to recover the damages caused by it. The forcible act and consequent injury constitute the cause of action. It is immaterial, so far as the question of liability is concerned, whether it was wilful, unintentional, or the result of negligence. It is enough, so far as the plaintiff's right to recover is concerned, that it cannot be justified. Whether it was wilful or unintentional may affect the measure of damages, but does not enter into the ground or reason of the defendants' liability. *Wakeman v. Robinson*, 1 Bing. 213.

In *Blinn v. Campbell*, 14 J. R. 432, the Court "held, that if the injury is attributable to negligence, though it were immediate, the party injured has his election, either to treat the negligence of the defendant as the cause of action, and declare in case, or to consider the act itself as the injury, and to declare in trespass."

The question was again discussed fully in *Percival v. Hickey*, 18 J. R. 257.

The action was trespass, for running down the vessel of the plaintiff at sea. The jury found for the plaintiff, and the judge having requested, if they should so find, that then should state the grounds of their verdict, "they added, that the disaster was the result of gross negligence in the defendant."

The question whether trespass could be maintained on such a state of facts was discussed until it was exhausted, and all the previous decisions critically reviewed. Chief Justice Spencer, who delivered the opinion of the Court, concluded with this declaration: "I am

perfectly satisfied, from a review of the cases, that if the defendant is liable at all, this action is appropriate, and that it ought to have been trespass rather than case, as the injury was immediate, and from gross negligence."

The complaint of the plaintiff charges, that the collision of the two trains was caused by the negligent, reckless, careless, and wrongful management of the trains; that by reason, and in consequence of the collision so produced, the platform of the car on which the plaintiff stood, "was with great force and violence shaken, and broken, and otherwise injured, by means whereof the plaintiff was knocked or thrown down, and with such power that his right leg was fractured between the ankle and knee, and he otherwise severely and seriously bruised and injured upon and about the body."

In brief, the complaint is, that plaintiff being a passenger in one of the trains, the defendants wrongfully ran the two trains against each other with such force and violence, that the plaintiff was knocked down, his leg was fractured, and he was otherwise severely bruised and injured.

This states, as a cause of injury and ground of action, a wrongful and forcible act of the two defendants, of itself single and entire, which immediately and directly injured the plaintiff's person. Trespass would lie, for such an act, against the parties concerned in this act of force and injury.

Enough is stated to make a declaration good in substance, in an action of trespass *vi et armis*.

Then what is the rule, as to the persons chargeable as principals, or joint trespassers, in such an action?

It cannot be stated better, or more briefly, than was done by the Court in *Guille v. Swan*, 19 J. R. 381-382. "Where an immediate act is done by the co-operation, or the joint action of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all."

Without the gross negligence of each defendant, there might have been no collision, and, of course, no injury. It cannot be affirmed, from any fact found, nor be deduced clearly from the evidence, that if either of the defendants had not been guilty of negligence, there would have been a collision.

The act, which is charged as the direct cause of the injury, is the result of the co-operating action of both defendants, and without such co-operating action, might not, and for aught we know, or can see, would not have occurred or existed.

In this respect, it differs intrinsically from the facts of some cases, which are relied upon as tests to determine whether an action shall be joint or several.

A reference to one or two, as a specimen of the class, will suffice.

Williams v. Sheldon, 10 Wend. 654, was an action against eight persons, as joint trespassers, for cutting and carrying away logs from

the plaintiff's lot. One hundred and fifty logs were cut and carried away. The jury were charged, in substance, that if they acted in concert in cutting all the logs, they were jointly liable; but if any of them were acting separately, and for themselves alone, without any concert with the others, they ought to be acquitted, and those only found guilty who were acting jointly.

If, instead of one hundred and fifty logs only one tree had been cut, and all had been proved to be present and employed at the same time, upon the tree, in cutting it up and carrying it away, I apprehend there would be no doubt of their joint liability. If the act of trespass had been confined to a single piece of property, and all had actually co-operated in that act, no question of mental concert, or concurrence of purpose, could have been raised.

In *Auchmaty v. Ham*, 1 Denio, 495, and *Van Steenburgh & Gray v. Tobias*, 17 Wend. 562, the defendants were not sought to be charged for anything done in person, or by their agents.

Two persons, each of whom owned a dog, were sued jointly, because their dogs had chased and worried a flock of sheep, and killed some of them, and injured others.

It was not the case of an immediate act, by the co-operation of two persons, or their agents, causing a direct and immediate injury to the person, or a specific and single thing, the property of another. Some of the sheep may have been bitten, or killed, solely by the one dog, and some by the other.

In the present case the cause of the injury was a single act. It was immediate, its continuance or duration was but for a moment. It was forcible and violent. The plaintiff's person was injured directly by it. The injury was caused solely by the co-operation of the two defendants in a forcible act, and so absolutely so that, without this co-operation of the two, the act itself might not, and, for aught we can see, would not have existed as a fact.

[Omitting remainder of opinion.]

WOODRUFF, J. (dissenting). [Omitting part of opinion.] After careful reflection, I am constrained to say, that upon the facts in this case, a joint action against these defendants cannot be maintained.

A fundamental principle lies at the foundation of all joint liability, and that principle is, that each of the parties charged is liable for the act or default of the other. This is no more and no less true in reference to joint liability in actions *ex contractu* than in those *ex delicto*; in the former these parties are liable upon the same grounds, and for or in respect to the identical cause, and to the same extent.

And in actions *ex delicto* it is of the essence of joint liability, that the acts or defaults of each defendant are imputed to the other, as effectively for all purposes, as if they were the acts or defaults of himself; and the liability of each for the acts or defaults of the other, enters not merely into the extent of the liability of each, but into the very basis and ground of such liability.

And as respects the ground of liability in its bearing upon the question whether two parties are jointly liable, it makes no difference whether the action be trespass *vi et armis* (formerly so called) or trespass on the case for consequential damages. In the former case, each must be liable for the trespass which the other has committed, i. e., each must be liable for the other's act. In the latter case, each must be liable for and in respect of the act or default of the other, from which the consequential damages have resulted.

It is in the very elements which constitute a joint liability that the case before us is deficient.

There is nothing in the relation which the defendants bear to each other or to the present plaintiff, or to the injury which he has sustained, or to the cause of such injury, that subjects them to a joint action.

All that can be truly said, in my opinion, of the defendants is, that each company is liable for its own acts or defaults, or the acts or defaults of its own servants.

The very basis and ground of action here is the negligence of the defendants' servants. By whatever name the action be called (with reference to our former legal nomenclature), whether trespass or case, it is the negligence of their servants alone that makes the defendants liable at all. Had there been no negligence there would be no right of action. Even if the collision, with all its consequences to the plaintiff, had happened, there would have been no liability without such negligence.

Now, however difficult to separate the consequences of the separate negligence of either defendant, yet each is liable, or responsible, in respect of its own negligence, and for its own negligence only.

The relation of the two companies to the plaintiff and to the alleged wrong are wholly different, and exhibit the defendants in an entirely several or separate character.

A mutual violation of a joint duty makes both parties liable, and each liable for such violation by the other.

Now there was no joint duty. The duty of the New York and Harlem Railroad Co. to the plaintiff arose from their undertaking to carry him. The only duty owed to him by the New York and New Haven R. R. Co., was a duty which they owed to all mankind, so to conduct their business that no one should be injured by their culpable act or neglect.

The nature and extent of the duties of the companies respectively was different. The New York and Harlem R. R. Co. was bound to exercise the highest prudence, and the utmost care and skill, which was, under the circumstances, practicable, and which the most prudent person would use for the safety of those entrusted to them for carriage.

The New York and New Haven R. R. Co. were only bound (in their relation to the present plaintiff), to exercise ordinary care and pru-

dence, in view of the nature of the business in which they were engaged, and the circumstances in which they were acting.

So, also, defendants uniting in a joint act are liable jointly for the injury caused thereby.

But if there be no common purpose, the act is not joint unless there is an actual union of the parties in the act complained of; indeed, the actual union of the parties in the act complained of, in general creates a joint liability, because such actual union is evidence of the common intent. But if it were conceded that in such case it would be none the less joint because there was no intent to do the act, when in truth the act is single, and both parties act together in it, still, if such a case can be supposed, it would fail to illustrate the present case, for here it is not an act, but a neglect, that constitutes the ground of liability. In this there is no union of the parties if the common intent be wanting.

The neglect of the one company is not here the neglect of the other; nor had the one any agency in producing the neglect of the other. The negligence of either is, as a ground of liability, entirely independent of the other, not causing, nor tending to cause, the negligence of the other.

If either are liable for the collision and its consequences, it is not because the collision and its consequences are a ground of legal liability, but because the collision resulted from the negligence, — that, and that only, being the ground of liability. The circumstance that the consequence of the several neglect of the two defendants produced one result, to wit, the collision, is a merely incidental and casual coincidence, and does not alter the nature or essential character of the cause to which the liability is to be referred.

So there is joint liability for an act or acts done by each in furtherance of a common purpose. This is clearly so when there is a common intent to injure. It may, however, be conceded that (even in the absence of an intent to injure), the liability is joint if the injury result from an act or acts done in execution of their concurring intent to do, or to omit to do, precisely what was done or omitted. Here no such ground of liability is even claimed. Each company was prosecuting its own separate business, with wholly distinct and unconnected purposes, in no wise contemplating the act or default of the other, and, indeed, in ignorance of the acts or neglects of the other, until everything had been done or neglected which involves them in liability at all.

Again, there may be a joint liability for the negligence of either, when both are at the same time engaged together, each contributing to the accomplishment of a common design. It is not necessary to seek illustrations of this proposition or to define strictly the narrow limits to which it must be confined. Instances might be suggested that would come within the definition, and yet in which such joint liability would not result, and others in which it would clearly follow.

But here there is no claim, and can be none, that there was any common intent or purpose whatever.

In the cases above supposed, the defendants are mentioned as if acting or neglecting in their very persons, and not by agents or servants; and in some of the cases stated there might be no liability at all by the principal, for the acts supposed, if done by servants; but it is not material to my purpose to discriminate, as the propositions are stated merely to define the ground of joint liability and the contrary.

Here, the ground of the liability of each being negligence, each is liable for the fault of their own servants, and only for such fault.

And the companies were acting wholly independently of each other.

They were not discharging any common obligation to the plaintiff.

They violated no common duty.

The fallacy in the claim that the liability is joint results from regarding the collision as the ground upon which the defendants are to be charged. It is not in respect of the collision, which is itself a consequence, but in respect of the negligence that caused a collision, that either are liable.

The *culpa causans* is separate in respect to each, and whether injury results concurrently or not, cannot change their relation to each other. The fact of liability for the consequence exists, in a strictly logical sense, prior to the consequences themselves. The consequences are only considered in determining to whom and to what extent that liability subjects them.

The fallacy is rendered more easy of adoption from what is the peculiarity and only incidental feature of the present case, viz., that the injury sustained by the plaintiff is single, so that it is impossible to say how much of the injury resulted from the negligence of the one company, and how much from that of the other. This, certainly, cannot alter the principle upon which the liability of the parties depends. Its only result may be, that in an action against either, the defendant may, *ex necessitate* be subjected to the whole consequences of the occurrence.

Suppose that, instead of injuring a person, the respective colliding trains had, upon the occasion in question, injured some inanimate object of value interposed between them, but so that the injury received from the force of the one train could be distinguished from the injury received from the force of the other. Can it be doubted that each company would be liable for the injury done by its own train, and for that injury alone? I think not.

Each would be liable for negligently and violently running its train against the object injured, and for the injury thus produced. In principle, I think the present case is not different.

In neither case is either liable for the negligence of the other, nor, in principle, for the consequences of the negligence of the other.

Suppose two separately and falsely represent a person to another as

worthy of credit; in reliance upon the representation of both, he sells such person goods; and suppose it be true that no such sale would have been made had not the representation by the one been corroborated by the like representation by the other, I deem it quite clear that no joint action will lie, without proof that the defendants conspired together to procure the credit, and effect the deceit.

In what I have said in relation to the necessity of showing a concurring purpose to sustain a joint action against the defendants, it is not intended to insist that where two or more unite in an act of trespass, the motive or intent with which they commit the act is material. The act may be committed in the belief that what is done is lawful, and be none the less a joint trespass, and, in the language of the Court in *Guille v. Swan*, above cited, "where an immediate act is done by the co-operation or the joint act of several persons, they are all trespassers and may be sued jointly or severally, and any one of them is liable for the injury done by all;" and although, in that case, the defendant was held liable for the acts of others, though wholly without wrongful intention on his part, it was because his act would ordinarily and naturally produce, and did produce, the acts of the others.

In the present case the liability of neither defendant is founded in any act of the defendants or of either of them, but in negligence only, and the negligence of either in nowise tended to produce negligence in the other.

I am aware that ingenuity might suggest examples in which it would be difficult to say whether the liability of two persons is joint or only several, or rather cases, where the only proofs which could probably be given would render it difficult to apply this rule. As where two men, each in pursuit of his own private revenge, or for the gratification of his own malice, strike another at the same time, without concert or even knowledge of the other's intention; or two men at the same moment apply fire to another's house in different places, each in like ignorance of the acts or doings of the other, and it burns down. Other examples might be suggested, and often the coincidence of time, place, and act, would raise a presumption of a common purpose; and it may often, where the acts are clearly several, be practically impossible to say exactly how much damage is caused by the wrong of one defendant and how much by the fault of the other.

But such cases furnish no reason for a departure from principle.

[Omitting remainder of opinion.]

The majority of the Court concurred with BOSWORTH, J.

Judgment on the verdict.

The above decision was affirmed by the Court of Appeals, 20 New York, 492; GRAY, J., saying: "Had the collision set in motion a third body, which in its movement had come in contact with and pro-

duced the same injury to the plaintiff, no good reason can be assigned against their joint liability; such a case is in principle like the one under consideration."

DENIO, J., dissented "upon the ground that a joint action was not maintainable."

STONE v. DICKINSON.

1862. 5 *Allen*, 29.

TORT to recover damages for false imprisonment.

At the trial in this Court, before Merrick, J., it appeared that on the 7th of June, 1858, the plaintiff was arrested by the same officer on nine different writs in favor of different creditors, one of which was in favor of the defendant, which were all served at the same time by arresting the plaintiff and committing him to jail, where he was held in confinement upon them all until the 10th of February, 1860, at which time he obtained his discharge on *habeas corpus*, on account of defects in the affidavits upon the writs. *Stone v. Carter*, 13 Gray, 575. The defendant offered to prove that the plaintiffs in several of the said actions had, since the date of the discharge of the plaintiff from jail, given up to him their notes upon which their suits were brought, and in consideration thereof the plaintiff discharged them "from all claim and demand for false imprisonment, by reason of the arrest of June 7th, 1858," for which suits were pending against them, respectively. The judge excluded the evidence.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

E. B. Stoddard & T. L. Nelson, for defendant.

H. D. Stone, *pro se*.

BIGELOW, C. J. Several questions were raised at the trial of this case, upon which it seems to be unnecessary to express an opinion, inasmuch as we are satisfied that, on the facts offered to be proved, the defendant established a good defence to the action, and that the jury should have been instructed accordingly. There can be no doubt of the rule of law, that co-trespassers are jointly as well as severally liable for the damages occasioned by their wrongful acts; and, as a consequence of this, that a release to one joint trespasser, or satisfaction from him for the injury, discharges all. *Brown v. Cambridge*, 3 Allen, 474, and cases cited. This principle is applicable to the case at bar. In the opinion of the Court, the several persons on whose writs and by whose order the plaintiff was committed to jail, and held in confinement from June 1858 to February 1860, must be regarded in law as co-trespassers. Evidence was offered at the trial to prove that he had received satisfaction from some of them for his alleged wrong, and

had given to them in writing a discharge for the damages he had suffered by reason of his arrest and false imprisonment. This satisfaction and discharge in legal effect operate as a release of the present cause of action against the defendant.

It cannot be denied that the parties who were plaintiffs in the original actions, in suing out their writs against the present plaintiff, and causing him to be arrested and imprisoned, acted separately and independently of each other, and without any apparent concert among themselves. As a matter of first impression, it might seem that the legal inference from this fact is, that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers, in the absence of proof of any intention to act together, or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he has been unlawfully arrested and imprisoned. This is the wrong which constitutes the gist of the action, and for which he is entitled to an indemnity. But it is only one wrong, for which in law he can receive but one compensation. He has not in fact suffered nine separate arrests, or undergone nine separate terms of imprisonment. The writs against him were all served simultaneously, by the same officer, acting for all the creditors, and the confinement was enforced by the jailer on all the processes contemporaneously, during the entire period of his imprisonment. The alleged trespasses on the person of the plaintiff were, therefore, simultaneous and contemporaneous acts, committed on him by the same person acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is, then, the common case of a wrongful and unlawful act, committed by a common agent acting for several and distinct principals.

It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers, by whom the tortious act was done, were the agents of several different plaintiffs, who, without preconcert, had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of principals, who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass, committed by an agent, can be multiplied by the number of principals who procured it to be done, so as to entitle the party injured to a compensation graduated, not according to the damages actually sustained, but by the number of persons through whose instrumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him, and caused him to be arrested and imprisoned, cannot be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such

preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured. Whether the act was done by the procurement of one person or of many, and, if by many, whether they acted with a common purpose and design in which they all shared, or from separate and distinct motives, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, or the damages increased which the party injured has a right to recover. He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with a privilege of electing to take his satisfaction *de melioribus damnis*. But there is no rule of law by which he can claim to convert a joint into a several trespass, or to recover more than one satisfaction for his damages, when it appears that he has suffered the consequences of a single tortious act only. Take an illustration. Suppose that several persons have a grudge or spite against the same individual, but that neither of them is aware of the existence of this feeling in the others; and that each of them, for the purpose of gratifying his malice, without concert or coöperation with any one, and in ignorance of a similar intent on the part of others, employs the same person—a hired pugilist or bully—to inflict on the common object of their ill will a severe personal castigation. In such a case, no one would doubt that all the persons who incited to the commission of the assault and battery would be regarded as co-trespassers. They, each and all, would be responsible for procuring the act to be done. They would be severally as well as jointly liable to an action in favor of the party injured. But no one would contend that he could recover satisfaction from each of the persons liable to an action. When the damages suffered by him had been once paid by any one of those who procured the commission of the trespass, he could not claim to recover them again from each of the others. The law will not permit a party to receive anything more than a compensation for an injury. Where there has been only one wrongful act, there can be but one full and complete indemnity. When that is obtained, the party injured has exhausted his remedy. Another illustration, more analogous to the case at bar, will serve to show the soundness of this conclusion. If, instead of the arrest and imprisonment of which the plaintiff complains, the nine writs against him had been served simultaneously by the same officer, by making an attachment of personal property belonging to him,—his horse, for example,—in such case it could not be doubted that if, for any reason, the attachments were irregular and void, the plaintiff would be entitled to recover and to receive from one or all of the parties by whose order the attachments were made the full value of his horse. But it is equally clear that he could not rightfully claim to receive this sum in damages from each of them, or nine times the value of the animal.

And yet such would be the result, if the attaching creditors are not to be regarded as co-trespassers. Nor is this the only absurd result which would follow from such a doctrine. If each attachment or each arrest and imprisonment on the several writs is to be deemed as a distinct trespass, for which the creditors are separately and not jointly liable in like manner as if made on one writ only, without any reference to those which were served simultaneously; we can see no reason why the officer might not be held liable to pay to the plaintiff damages as many times as there were writs served by him. He certainly must be regarded as a joint trespasser with each creditor whose writ he served; and if the service of each writ constituted a distinct trespass, for which the party injured might receive separate damages from each creditor, then the officer would also be subject to a like liability.

These views have led us to the conclusion that the evidence offered at the trial by the defendant to show that the plaintiff had received full satisfaction for the arrest and false imprisonment to which he had been subjected, and for which he claimed damages in this action, from some of his creditors by whose order he was committed to jail, ought to have been admitted, and that the jury should thereupon have been instructed that the plaintiff could not maintain this action.

Exceptions sustained.

LITTLE SCHUYLKILL NAVIGATION CO. v. RICHARDS' ADMINISTRATOR.

1868. 57 *Pennsylvania State*, 142.¹

ERROR to the Court of Common Pleas of Schuylkill County.

F. B. Gowen and J. Bannan (*T. R. Bannan* with them), for plaintiffs in error.

F. W. Hughes (*G. E. Farquhar* and *F. Hoffman* with him); for defendant in error.

AGNEW, J. All the assignments of error, from the 4th to the 11th inclusive, involve substantially the same question, and may be considered together. The plaintiff's intestate was the owner of a dam and water-power upon the Little Schuylkill river. In process of time, from 1851 to 1858, the basin of the dam became filled with the coal-dirt, washed down by the stream from the mines above, of several owners, upon Little Schuylkill, Panther creek, and other tributaries. They were separate collieries, worked independently of each other. The plaintiff seeks to charge the defendants below with the whole injury caused by the filling up of his basin. The substance of the charge and answers to points was, that if at the time the defendants were engaged in throwing the coal-dirt into the river, about ten miles

¹ Statement and arguments omitted. — ED.

above the dam, the same thing was being done at the other collieries, and the defendants knew of this, they were liable for the combined result of all the series of deposits of dirt from the mines above from 1851 till 1858. The aspects of the case were varied, by deposits being made on and along the banks of the streams, which were carried away by ordinary rains and freshets; but the above is the most direct statement of the injury alleged, and is taken therefore as the test of the principle laid down by the Court. The doctrine of the learned judge is somewhat novel, though the case itself is new; but, if correct, is well calculated to alarm all riparian owners, who may find themselves by a slight negligence overwhelmed by others in gigantic ruin.

It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal-dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal-dirt, he who threw in the coal-dirt, and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of the dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream, — this is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the defendant's act upon his own land, and this act was wholly separate, and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream his dirt filled only its own space, and it was made neither more nor less by the accretions. True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injury that others do.

This is bad logic and hard law. Without concert of action no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest, and the action must be joint and several. But

the moment we should find them jointly sued, then the want of concert and the several liability of each would be apparent. These principles are fully sustained by the following cases: *Russell v. Tomlinson et al.*, 2 Conn. 206; *Adams v. Hall*, 2 Vermont, 9; *Van Steinberg v. Tobias*, 17 Wend. 562; *Buddington v. Sherer*, 20 Pickering, 477; *Auchmuty v. Ham*, 1 Denio, 495; *Partenheimer v. Van Order*, 20 Barb. 479. These were cases where the dogs of several owners united in killing sheep, and where the cattle of different owners broke into an enclosure and united in the damage. The concert and united action of the dogs and cattle were held to create no joint liability of their owners, notwithstanding the difficulty of determining the several injury done by the animals of each. The rule laid down in the last case was that where the owner of the garden could not prove the injury of each cow, the jury would be justified in concluding that each did an equal injury. Several cases were cited in opposition, but do not, in our opinion, support the doctrine of the charge.

In *Stone v. Dickinson*, 5 Allen, 29, where an officer made an arrest at the same instant upon nine writs, and the parties were held jointly liable for the trespass, the ground of action was the arrest itself, a single act, incapable of division or separation, but being authorized by all, all were held to have been concerned in the very act, which each authorized the same agent to commit. In *Colgrove v. N. Y. and N. H. and N. Y. and Harlem Railroad Companies*, 20 N. Y. Rep. 492 (6 Smith), the two companies were using the same track by joint arrangement governed by common rules, the collision of their trains was owing to mutual and concurring negligence, and the injury, which was single, was therefore their concurrent and direct act. They were held to be jointly liable because of their joint use of the track, their common duty to all travelling the road, and their concurrent negligence in the direct act which caused the injury. The case of the party-wall in this State was put on the same ground. The distinction between that case and this was sharply defined by our Brother Strong. It was there said that the maintenance of an insecure party-wall was a tort in which both participated. The act was single, and it was the occasion of the injury. The case is not to be confounded with actions of trespass brought for separate acts done by two or more defendants. Then if there be no concert, no common intent, there is no joint liability. Here, the keeping of the wall safe was a common duty, and a failure to do so was a common neglect. *Klauder v. McGrath*, 11 Casey, 128. In principle, *Bard et al. v. Yohn*, 2 Id. 482, more resembles this case. There the effects of the independent acts of the defendants on the opposite sides of the street united in causing the injury, but they were not jointly liable, because there was no concert in the acts themselves.

[Remainder of opinion omitted.]

Judgment reversed. Venire facias de novo awarded.

SIMMONS v. EVERSON, ET ALS.

1891. 124 *New York*, 319.¹

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 9, 1890, which affirmed so much of a judgment in favor of plaintiffs, entered upon a decision of the Court on trial at Circuit, as was against the defendants Everson, Pierce, and Lynch, and reversed so much as was against the defendant, the City of Syracuse, and as to said defendant granted a new trial.

This action was brought to recover damages for the death of Myron W. Simmons, plaintiffs' intestate, which was alleged to have been caused by the defendants' negligence.

The trial Court found that for many years prior to October 18, 1887, the appellants owned in severalty three lots, each being twenty-two feet wide, and bounded on the east by the centre line of South Salina Street, in the city of Syracuse. The south lot was owned by the defendant Lynch; the middle one by the defendant Pierce, and the north one by the defendant Everson. On these lots stood three brick stores, separated from each other by brick partition walls extending from the foundations to the roofs. A continuous brick wall of uniform height (about 60 feet) and thickness, stood adjacent to the west line of the street and formed the front of the buildings. The partition walls and the front wall were interlocked or built together.

On the date mentioned the three stores were substantially destroyed by fire; nothing being left standing except the front wall, a part of the partition walls, and a small part of the wood-work in the front of Everson's building. Shortly after this event the front wall began to lean toward the street, and continued to incline more and more in that direction until November 17, 1887, when it gave way near the point where it was united with the partition wall between the buildings of Lynch and Pierce, carrying down the entire front and part of both partition walls. Material from the part of the front wall standing on the lots of Everson and Pierce, and from their partition wall, fell on and killed the plaintiffs' intestate, who was lawfully on the sidewalk near the boundary between their properties. No part of the walls on Lynch's lot fell on decedent. It was found that immediately after the fire the front and part of the partition walls became weak, unsafe, dangerous, and liable to fall into the street, and that each of the defendants was careless and negligent in not removing or supporting the walls on his own lot, and that the several neglects of the defendants united and directly caused the walls to fall. It was further found that these walls were so unsafe that they were a public

¹ Arguments omitted. — Ed.

nuisance, and also that the decedent did not negligently contribute to the accident or to his own death. The damages were assessed at \$5,000.

M. M. Waters, for Everson.

Smith, Kellogg & Wells, for Pierce.

Hiscock, Doheny & Hiscock, for Lynch.

William Nottingham, for Simmons.

FOLLETT, C. J. It is urged, in behalf of the defendants, that at most this is but a case of several independent acts of negligence committed by each, the joint effect of which caused the accident, and for which they are not jointly liable within the rule laid down in *Chipman v. Palmer*, 77 N. Y. 51.

The case at bar does not belong to the class of actions arising out of acts or omissions which are simply negligent, and while the defendants did not intend by their several acts to commit the injury, their conduct created a public nuisance which is an indictable misdemeanor under the statutes of this State (Penal Code, §§ 385, 387; *Vincett v. Cook*, 4 Hun, 318), and at common law. *Regina v. Watts*, 1 Salk. 357; s. c., 2 Ld. Raym. 856; 1 Russ. Cr. (5th ed.) 423; 2 Whar. Cr. Law, § 1410; Big. Torts, 237; Pol. Torts (2d ed.) 345; Stephens Dig. Cr. Law, art. 176; Indian P. C. 268.

Persons who by their several acts or omissions maintain a public or common nuisance, are jointly and severally liable for such damages as are the direct, immediate, and probable consequence of it. *Irvine v. Wood*, 51 N. Y. 224, 230; *Slater v. Mersereau*, 64 id. 138; *Timlin v. Standard Oil Co.*, 54 Hun, 44; *Klauder v. McGrath*, 35 Penn. St. 128; 1 Shear. & R. Neg. (4th ed.) § 122; Pol. Torts (2d ed.) 356.

The fall of these four-story brick walls into the street was the direct and immediate consequence of the several acts of the defendants in suffering the portions standing on their own lots to remain unsupported after they had visibly begun to incline towards the street, and it was as obvious before, as it was after the accident, that if any part of the front wall fell, a large part of it must, and that it would go into the street.

The judgment should be affirmed, with costs.

All concur, except VANN, J., not voting.

Judgment affirmed.

SECTION II.

Whether Damages in an Action against Joint Wrongdoers should be assessed as Entire or Severally.

HILL ET AL. v. GOODCHILD.

1771. 5 Burrows, 2790.

THIS was a writ of error from the Court of Common Pleas. It was twice argued: first, on Tuesday, 23d April, 1771, by Mr. Morgan for the plaintiff in error, and Mr. Walker for the defendant in error; and again on Tuesday, 4th June, 1771, by Mr. Wallace for the plaintiff in error, and Mr. Dunning for the defendant in error. The roll in C. B. is No. 632. The pleadings were in substance as follows: trespass *vi et armis*, brought in C. B. by Goodchild against Hill and Winsey, for an assault and battery. The defendants plead "Not guilty;" and issue is joined thereupon. The jury find them guilty; and assess damages against Hill (besides costs and charges), to 40s., and for costs and charges, 40s., and they assess damages against Winsey, to one shilling only. And the judgment is, that the said Charles Goodchild do recover against Hill, the damages aforesaid to four pounds, and also £23 for his costs *de incremento*; in all, £27; and that he do recover against Winsey, the damages aforesaid to one shilling, and also one shilling for his costs; in all, two shillings.

The defendants brought a writ of error: and several errors were assigned; and particularly, that the jury had given damages against the defendants severally and distinctly for one joint trespass; whereas the damages ought to have been joint, and not several. And the Court have given judgment against them to recover several and distinct damages for one joint trespass.

Many cases were cited on both sides. For the plaintiff in error, Cro. Eliz. 860; *Austin v. Willward and two others*, Cro. Jac. 384; *Matthews and his Wife v. Cole and others*, Cro. Jac. 118; *Crane & Hill v. Hummerstone*, 3 Lev. 324; *Smithson v. Garth and others*, Carthew, 19, 20; *Rodney v. Strode et al.*, 3 Mod. 101 S. C.; 1 Stra. 422; *Onslow v. Orchard*, 2 Stra. 910; *Lowfield v. Bancroft et al.*, 11 Rep. 5; *Sir John Heydon's case*, 5th resolution, fo. 7; Cro. Car. 193; *Johns & Robinson v. Dodsworth*, 1 Wilson, 30; *Sabin v. Long*, Co. Lit. 232; Hob. 66, and 9 Co. 79 b. For the defendant in error, 1 Bulstrode, 157; *Sampson v. Cranfield and Upton*, in point; and the reason given, "Because the battery of the one can't be the battery of the other; and the battery of the one may be greater than the battery of the other," 2 Stra. 1140; *Chapman v. House, Slater, & Goodacre*, Jenkins's Centuries, 317, pl. 10; *Lane v. Santloe*, 1 Stra. 79, which case showed, they said, that *Sir John Heydon's case* was not considered by Lord

Ch. J. King as an authority. And they called it a confused case, and of doubtful authority. It was replied by the counsel for the plaintiff in error, in answer to this treatment of *Sir John Heydon's case*, that there has been no subsequent determination in contradiction to it; that the case of *Player v. Warn and Dewes*, in Cro. Car. 54, 55, mentions it without disapprobation of it; and that it seems to be adopted by the Court in the case reported by Serjeant Wilson.

The Court observed, that there was a very great confusion in the cases upon this subject, which ought to be carefully looked into, and settled. Some of them are diametrically opposite. And Mr. Justice Aston added, that some of them were determined upon principles not agreeable to his understanding. LORD MANSFIELD observed, that in fact all the defendants may be guilty; and yet the degrees of their guilt may be different; but the present question is whether upon a charge of a *joint* trespass, the jury can assess damages according to different degrees of guilt; though the real justice is, that the damages should be respectively assessed in proportion to the real injury done by each defendant. This is a question that is of general experience, and concerns all the courts in Westminster-hall. It is a strange thing that a matter which happens every day should be attended with such difficulties. Neither side of the determination will reconcile the cases. However, we will consider of it.

Cur. advis.

And now LORD MANSFIELD delivered their opinion.

We hold that, as the trespass is *jointly* charged upon both defendants, and the verdict has found them both *jointly guilty*, the jury could not afterwards assess several damages. His lordship particularly mentioned the cases of *Austen v. Wilward*; the 5th resolution in *Sir John Heydon's case*; the case in Cro. Jac. 118; of *Crane and Hill v. Hummerstone*; the case of *Rodney v. Strode*, in Carthew 19, and Jenkins's Centuries, 317, pl. 10, as warranting this opinion.

We do not think that the present case calls for an opinion upon those cases where the defendants are charged jointly and severally; or where the defendants plead severally; or where the defendants are found guilty of several parts of the same trespass or at a different time; or where a joint action is brought for two several trespasses, and the damages found severally, as being severally guilty. We don't meddle with any of these cases: there is a variety of opinions in the books relating to them. It is enough for us to found our present determination upon the present case. And the present case is, that the count is of a *joint* trespass; and the jury have found the defendants guilty of a *joint* trespass, and yet have severed the damages. We are of opinion that, in such case, the damages can't be severed.

The consequence is, that the judgment must be reversed.

Judgment reversed.

HALSEY v. WOODRUFF.

1830. 9 *Pickering*, 555.

TRESPASS against Halsey and Avery for entering Woodruff's close and pulling down a blacksmith's shop; with counts for carrying away the materials.

The defendants plead severally the general issue.

The jury find "that the said Avery is guilty in manner and form as the plaintiff has alleged, and assess damages against said Avery at two dollars, and the jury also find that said Halsey is guilty in manner, &c., and assess damages against said Halsey at seventy-five dollars."

The plaintiff elected to take judgment against both defendants for the greater damages, and entered a *remittitur* as to the lesser damages.

The defendants sued out a writ of error, assigning for error, that although the jury which tried the cause returned a separate verdict of seventy-five dollars against Halsey and also a separate verdict of two dollars against Avery, the Court rendered a judgment against both for the sum of seventy-five dollars and costs.

Dwight and Bishop, for the plaintiffs in error, cited *Kempton v. Cook*, 4 Pick. 307; *Kennebeck Purchase v. Boulton*, 4 Mass. R. 419; *Livingston v. Bishop*, 1 Johns. R. 290; *Heydon's case*, 11 Co. 5.

Porter, contra, cited Bac. Abr. *Damages*, D. 4; *Rodney v. Strode*, Carth. 19; *Mitchell v. Milbank*, 6 T. R. 199; 2 Tidd's Pr. 805; *Hill v. Goodchild*, 5 Burr. 2790; *Brown v. Allen*, 4 Esp. R. 158.

PER CURIAM. We think the judgment was rightly entered. The result of the authorities, which are numerous, is, that where a joint action is brought against two for a trespass done, and there is a judgment against both, it must be a judgment for joint damages. All the legal consequences of there being a joint judgment must necessarily follow; one of which is, that each is liable for all the damage which the plaintiff has sustained by such trespass, without regard to different degrees or shades of guilt. *Heydon's case* cites many of the authorities, the effect of which is given in Tidd, that where the action is brought against several defendants and the jury assess several damages, the plaintiff may enter a *remittitur* as to the lesser damages and take judgment against all who are guilty of the joint trespass, for the greater damages. And this is founded on a sufficient reason. Each defendant is liable for the whole damages of a joint trespass. A release to one discharges both, and the reason is, that the damage is joint. The plaintiff here alleges a joint trespass. The defendants plead severally, that they are not guilty—of what? of the joint trespass; and they are found guilty—of what? of the same joint trespass. Damages are assessed against one at seventy-five dollars; this therefore, by the finding of the jury, is the damage which the plaintiff has sustained, and the law

draws the inference that both are liable for that sum. The inquiry of damages, though made by the same jury, when an issue in fact is tried, is in some degree collateral to the trial of the issue. Where there is judgment on an issue of law alone, there must necessarily be a distinct inquiry of damages, and then the question for the jury is only what damages has the plaintiff sustained, by reason of the trespass done, without regard to the particular acts done by either of the defendants. So where the damages are found by the jury, on an issue in fact, the sole inquiry open to them is, what damages the plaintiff has sustained, not who ought to pay them; and therefore their finding of separate damages is beyond their authority and merely void. Suppose in an action against two for a joint trespass, one of the defendants demurs to the declaration, and the declaration is sustained, and the other pleads the general issue, which is found against him and damages are assessed; judgment would be rendered that both were guilty, and execution would issue against both for the damages so found by the jury. On principle, as well as authority, the judgment entered in the case before us was correct.

Judgment affirmed.

SECTION III.

Liability Several as well as Joint.

RICH v. PILKINGTON, LORD MAYOR OF LONDON.

2 & 3 William & Mary. Carthew, 171.

ACTION on the case for a false return of a mandamus, in which action the plaintiff declared that he was lawfully elected into the office of Chamberlain of London, and that the defendant refused to admit him into that office; whereupon he brought a mandamus directed to the defendant, and the aldermen, &c., and the defendant returned that the plaintiff *nunquam fuit electus* to the said office, *ubi revera* he was lawfully elected by the majority, &c.

The defendant pleaded, in abatement, that the mayor and aldermen of London are a corporation, and that all of them in their judicial capacity in a Court of Aldermen jointly made the said return; and thereupon prayed judgment of the bill brought against the mayor alone.

And upon a demurrer to this plea, it was adjudged ill, for this action is founded on a tort, and therefore it may be either joint or several, at the election of the party, as in trespass, &c.

But it was objected, that the mandamus was directed to all, viz., to the mayor and aldermen, &c., and therefore it would be injurious to the

mayor, for it might be that he voted for the plaintiff against the return, and was overruled by the majority to make this return.

To which it was answered, and so resolved by the Court, that the mayor and aldermen are not a corporation, but they are a court, which is nothing to this purpose.

And as to the other matter, if the fact is so, that the defendant was overruled by the majority, and contrary to his will, this would have been evidence upon not guilty pleaded, and being proved, the plaintiff would have been nonsuit.

[Remainder of opinion omitted.]

MITCHELL v. TARBUTT ET ALS.

1794. 5 Term Reports (Durnford & East), 649.

THIS was an action on the case for negligence, wherein the declaration stated, That whereas one J. Jones and one G. Bolland, at the time of committing the grievance thereafter mentioned, were possessed of a certain ship called the Albion, which was then proceeding on a voyage from Jamaica to Bristol, and that there were then on board the said ship 600 hds. of sugar belonging to the plaintiff; and that whereas the said G. Tarbutt, N. A., J. H., D. T., and J. E. (the defendants), were at the time when, &c., possessed of a ship called the Amity Hall, whereof one G. Young was then master, then also sailing on the high seas, and the said G. Young, their servant in that behalf, then and there had the management of the said ship Amity Hall; yet, that the defendants, by their said servant, so negligently navigated their ship, that the said ship, by the negligence of their servant, with great force struck against the said ship of Jones and Bolland, then sailing with the plaintiff's goods on board, and so damaged the goods that they were wholly lost to the plaintiff. To this the defendants pleaded in abatement, that the grievance (if any) was committed by the defendants, and one A. Shakespear, C. Bryan, S. Orr, and J. Neuffville, jointly, and not by the defendants only. To which there was a general demurrer, and joinder.

Giles, in support of the demurrer, was stopped by the Court.

Wood, contra. If the declaration had charged a personal tort on the defendants themselves, the demurrer to the plea might have been sustained; because it might have been said to have been the separate trespass of each of the partners; but the injury is expressly alleged to have happened by the act of their servant, in which case one of the parties cannot be answerable more than another. And that is the distinction between trespass and case: in the former each person to whom the act is referable is liable, but in case all the parties who are answerable should be sued jointly; 'especially where, as in the present instance,

the act complained of is not done by themselves personally. The liability of the defendants arises from their being partners of the ship, and jointly responsible for the acts of their servants; and as they could not have sued alone for any damage done to their own vessel under these circumstances, so neither ought they to be severally answerable for the acts of others. In *Boson v. Sandford*,¹ which was an action upon the case in which the plaintiff declared against the defendants as owners of a bark in which his goods were, and showed that they were damaged by negligence; on a special verdict found, it was adjudged by Holt, C. J., Gregory, and Eyres, that this was a good defence, even on not guilty pleaded; but Dolben thought that it should have been pleaded in abatement. The difference of opinion, therefore, was only as to the mode in which the defendant should take advantage of the objection; for all the Court agreed, that he was entitled to avail himself of it in some shape or other. And to that difference must be referred the distinction which was taken between actions arising *ex contractu* and *ex delicto*. But that such a plea in abatement may be pleaded even to actions on the case in tort, appears from a case as far back as the Year Books 7 H. 4, 8.² A man brought a writ of trespass on the case against the Abbot of Stratford, and counted that he held certain land in the vill, by reason whereof he ought to repair a wall on the bank of the Thames; that plaintiff had lands adjoining, and that for default of reparation of the wall, his meadows and pastures were drowned with water. To which Skrene says, it may be that the abbot had nothing in the land, by cause whereof he should be charged but jointly with another; or otherwise, that the plaintiff had nothing in the land which was supposed to be surrounded with water, but jointly; in which case the one cannot answer without the other; nor can the plaintiff sue any action without the joint feoffee. Upon the whole, though this would not be a good plea to an action of trespass *vi et armis*, or even if the defendants had been personally charged with the act which occasioned the loss; yet to an action on the case, where they are only charged by reason of their relation to a third person, and of their joint property in the ship, the plea may be maintained.

LORD KENYON, C. J. With regard to the last case cited, there certainly is a distinction in the books between cases respecting real property and personal actions: where there is any dispute about the title to land, all the parties must be brought before the Court. But upon this question it is impossible to raise a doubt. I have seen the case of *Boson v. Sandford*, in the different books in which it is reported, in all of which this doctrine is clearly established, that if the cause of action

¹ Skin. 278; Vide. 1 Com. Dig. tit. Abatement (F. 8), S. C.; Carth. 58; Salk. 440; 3 Lev. 258. Vide also 2 Show. 446; 1 Show. 28, 101.

² Vide Bro. Abr. tit. Jointenancy, pl. 12, the possession of Skrene is referred to, as one which was not denied; but the case does not appear to have been decided on that ground.

arise *ex contractu*, the plaintiff must sue all the contracting parties; but where it arises *ex delicto*, the plaintiff may sue all or any of the parties, upon each of whom individually a separate trespass attaches. The case of *Boson v. Sandford* was treated by the whole Court as an action for a breach of contract; there indeed it was also determined that the defendant might take advantage of the objection, that all the contracting parties were not sued, on the plea of *non assumpsit*; but that being found inconvenient, a contrary doctrine has been since established.¹ But this being an action *ex delicto*, the trespass is several; and it is immaterial whether the tort were committed by the defendant or his servant, because the rule applies *qui facit per alium, facit per se*.

GROSE, J. The same distinction between the actions of tort and assumpsit was also laid down in *Child v. Sand*, Carth. 294.

LAWRENCE, J. In Carth. 171, it was held that an action for a false return to a mandamus was founded on a tort, and that "therefore it might be either joint or several, at the election of the party, as in trespass," &c. *Judgment for the plaintiff.*²

McAVOY v. WRIGHT ET ALS.

McAVOY v. DREW.

1884. 137 *Massachusetts*, 207.³

Two actions of tort for the conversion of a horse, wagon, and other articles of personal property. The cases were tried together.

It appeared that the defendant Drew, who was a constable, attached the property in question upon a writ in favor of the firm of Wright Brothers & James, the other defendants, and against one Frank J. Dempsey. Drew testified that he was instructed by the attorney of Wright Brothers & James to attach the property in question. Plaintiff offered evidence tending to show that said property was sold and delivered to him by Dempsey prior to the attachment.

The defendants requested the judge to rule that the two actions could not be simultaneously maintained. The judge declined so to rule; and ruled that both actions might be maintained and prosecuted to final judgment; and that, if the jury found for the plaintiff in both cases, they should assess the damages at the same sum in each case.

The jury returned a verdict for the plaintiff in each case, and assessed damages in the sum of \$462.95. Defendants excepted.

E. C. Gilman, for defendants.

J. A. McGeough, for plaintiff.

¹ *Vide* *Rice v. Shute*, 5 Burr. 2611; *Abbot v. Smith*, id. 2614, 5; and *Germaine v. Frederic*, Tr. 25 Geo. 3, B. R.

² *Vide* *Bristow v. James*, 7 Term Rep. 257.

³ Only so much of the case is given as relates to a single point. — Ed.

HOLMES, J. [After deciding other points.] The other exceptions are not pressed, and seem to be waived. Where there is a joint conversion like this, the plaintiff has his election to sue all or some of the tort-feasors jointly; *Mitchell v. Tarbutt*, 5 Term Rep. 649; 1 Wms. Saunders, 291, n. 4; 1 Chit. pl. (7th ed. by Greening) 97; and, at the same time, may maintain another action against one of them separately. *Elliott v. Hayden*, 104 Mass. 180.

[Omitting remainder of opinion.]

Exceptions overruled.

BREThERTON v. WOOD.

1821. 3 *Broderip & Bingham*, 54.¹

WRIT OF ERROR in the Exchequer Chamber.

Littledale, for plaintiffs in error.

Manning, for defendant in error.

DALLAS, C. J. This case comes before us by writ of error brought to reverse the judgment of the Court of the King's Bench.

The action is an action on the case against the plaintiffs in error.

The declaration stated that before and at the time of the grievances complained of, the plaintiffs in error were proprietors of a certain stage-coach for the conveyance of passengers for hire from Bury, in the county of Lancaster, to Bolton, in the same county, and being so, that they received the defendant in error (who was the plaintiff below), and he became an outside passenger, to be safely conveyed thereon from Bury aforesaid to Bolton aforesaid for hire and reward to the said plaintiffs in error in that behalf, and that by reason thereof the plaintiffs in error ought safely to have conveyed, or caused to be conveyed accordingly, the said defendant in error; it then alleges that, not regarding their duty in this behalf, they so conducted themselves that by and through the carelessness, negligence, unskilfulness, and default of themselves and their servants the said coach was upset, by means whereof the defendant in error was greatly bruised and wounded and sustained other injuries.

To this declaration the defendants below pleaded that they were not guilty, and issue was thereupon joined. The record states that the cause was tried at the last assizes at Lancaster, when the jury found that two of the defendants were not guilty, and that the other defendants were guilty, and assessed the damages of the plaintiffs below against them, besides the costs and charges, at £50. On this verdict the Court of King's Bench have given judgment for the plaintiff below that he do recover damages and costs against the defendants below,

¹ Statement and argument omitted. — Ed.

who were so found guilty, and that the two for whom a verdict of not guilty was given go without day.

The matter for our decision is, whether this judgment be erroneous. On the part of the plaintiffs in error it was contended that the statement of the case in the declaration amounts to a contract, and that being so, all the rules which relate to actions founded on contracts must govern, and that it is a rule of law that such actions are joint and must be maintained against all the defendants named in the declaration, or fail altogether. If it were true that the present action is founded on a contract, so that to support it a contract between the parties to it must have been proved, the objection would deserve consideration. But we are of opinion that this action is not so founded, and that on the trial it could not have been necessary to show that there was any contract, and therefore that the objection fails.

This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.

It appears by the different books of entries¹ that this form of action is of very ancient use.

Nor is it material whether redress might or might not have been had in an action of assumpsit; that must depend on circumstances of which this Court has no knowledge; but whether an action of assumpsit might or might not have been maintained, still this action on the case may be maintained. The action of assumpsit, as applied to cases of this kind, is of modern use. The action on the case is as early as the existence of the custom or common law as to common carriers.

If the action be not founded on a contract, but on a breach of duty depending on the common law, on a tort or misfeasance, it cannot be contended that the judgment is erroneous; for, from the nature of the case and the form of the action, it is several and not joint, and may be maintained against some only of those against whom it is brought.

In this view of the subject the authorities principally relied upon by the plaintiffs in error have no application.

The cases of *Powell v. Layton* and *Max v. Roberts* were decided by the same judges; they are in no respect like the case now before us. Each of these cases is an action against owners of a ship, not stated to be a general ship carrying the goods of all who choose to send them; but it is stated as a particular employment in each case. In the first of these cases, *Powell v. Layton*, the declaration is that the plaintiff, at the special instance and request of the defendants, had caused goods to be delivered to them, to be carried, conveyed, &c. Now, it is obvious that this was a case founded on a particular contract;

¹ Brownlow Redivivus, 11; Clift. 38, 39; Mod. Ent. 145; Herne, 76.

therefore, said the Court, the defendant's plea in abatement that the defendant, Layton, had a partner jointly interested to whom the goods were delivered, as well as to him the defendant, is good, and this person ought to have been joined.

In *Max v. Roberts*, which was before the same judges, the point in the cause was decided on the same principle, although the question arose in a different shape. There the declaration stated that the defendants were owners of a ship, and that the plaintiff delivered to them his goods to be carried, &c. On the trial the plaintiff failed in proving that the defendant Roberts and the eight other defendants were part owners; by his evidence he affected the eight only; the same judges who decided *Powell v. Layton* held that the owners had no duty imposed on them but what arose by contract, and adhered to the decision in *Powell v. Layton*.

In the present case, a duty was imposed on the defendants which did not arise by the contract, but by the custom or common law of England.

It is not material, therefore, to contrast the decision in these cases of *Powell v. Layton* and *Max v. Roberts* with the decision of the Court of King's Bench in the earlier case of *Govett v. Radnidge*, because this case differs from them. If these cases become opposed to each other it must remain to be decided hereafter which of them is right, if they differ. At present it is sufficient to say that this action is founded on a misfeasance, and that the declaration is framed accordingly, and therefore that the verdict and judgment given against some of the defendants is not erroneous, and ought to be affirmed.

Judgment affirmed.

LOW v. MUMFORD AND MUMFORD.

1817. 14 *Johnson*, 426.

IN ERROR, on *certiorari* to a Justice's Court.

The plaintiff in error brought an action in the Court below, against the defendant in error, "for keeping up a mill-dam on the Susquehanna River, below the lands of the plaintiff, whereby the water of the river was set back, and flowed the plaintiff's land," &c. The defendants pleaded in abatement, that the land on which the mill-dam was erected, and the mills appurtenant thereto, were held in joint tenancy by the defendants, together with several other persons (naming them), who were not made parties to the suit. The plaintiff objected to the sufficiency of the plea, but the justice gave judgment for the defendants.

PLATT, J., delivered the opinion of the Court. The general rule on this subject is, that if several persons jointly commit a tort, the plaintiff has his election to sue all, or any of them, because a tort is, in its nature, a separate act of each individual, and, therefore, in actions, in form *ex delicto*, such as trespass, trover, or case for malfeasance, against one

only, for a tort committed by several, he cannot plead the nonjoinder of the others, in abatement or in bar. 1 Chitty's Plead. 75. There is a distinction, however, in some cases between mere personal actions of tort, and such as concern real property. 1 Chitty's Plead. 76. In the case of *Mitchell v. Tarbutt*, 5 Term Rep. 65, Lord Kenyon recognizes this distinction, and says, "where there is any dispute about the title to land, all the parties must be brought before the Court." A case in the Year Books, 7 Hen. IV. 8, shows that a plea in abatement may be well pleaded for this cause, to an action on the case, for a tort. An action of trespass on the case was brought against the Abbot of Stratford, and the plaintiff counted that the defendant held certain land, by reason whereof he ought to repair a wall on the bank of the Thames; that the plaintiff had lands adjoining, and that for default of repairing the wall, his meadows were drowned. To which Skrene said, "It may be that the abbot had nothing in the land, by cause whereof he should be charged, but jointly with others, in which case the one cannot answer without the other."

But in actions for torts relating to lands of the defendants, there seems to be ground for this further distinction, viz. between nuisances arising from acts of malfeasance, and those which arise from mere omission, or nonfeasance. The case of the Abbot of Stratford was that of a nuisance, arising from neglect of duty in not repairing a wall, which was by law enjoined on the proprietor or proprietors of the land on which the wall stood. The gist of the action, therefore, was, that the defendant was such proprietor, and had neglected a duty incident to his title. The title to the land on which the nuisance existed was, therefore, directly in question; for if the abbot was not the owner of the land, he was not chargeable with neglect, nor liable for the nuisance. But in this case, the action is for a nuisance arising from an act of misfeasance, the "keeping up a mill-dam on a stream below the plaintiff's land." Here needs no averment that the defendant owned the land on which the dam was kept up. The title to that land cannot come in question in this suit, for the maintaining such a dam is equally a nuisance, and the defendants are equally liable for damages, whether the defendants own the land as joint tenants with others, or whether they are sole proprietors, or whether they have any right whatever in it. "Keeping up" the dam implies a positive act of the defendants: it is a malfeasance, and therefore, the plaintiff has a right of action against all or any of the parties who keep up that dam. Unless the title comes in question, there is no difference, in this respect, in cases arising *ex delicto*, between actions merely personal, and those which concern the realty. The plaintiff, in such an action, is always bound to join his co-tenants, because his title must come in question as the foundation of his claim; but he may sue any or all who have done the tortious act. The justice, therefore, erred in deciding against the demurrer to the plea in abatement, and the judgment must be reversed.

Judgment reversed.

SECTION IV.

Effect of Release of one of the Joint Wrongdoers.

COCKE v. JENNOR.

James I. Hobart, 66, pl. 69.

THOMAS COCKE brought an action of trespass against Kenelme Jennor for breaking his house, at Dunmow, and beating him, the last day of October, in the tenth year of the king. The defendant pleads that he, together with one Robert Milborne, in the time of the trespass supposed, did jointly break the plaintiff's house and beat him, and that afterwards, on the thirteenth day of June, 11 Jac. R., the plaintiff did release unto the said Milborne by his writing, which the defendant shows in Court, all actions, real and personal, &c., and avers that the trespass whereof the plaintiff complains, and which he and Milborne did jointly, *est una et eadem, et non alia neque diversa*. Whereupon the plaintiff demurred, and it was adjudged for the defendant; for though a trespass be joint and several to this purpose, that he may sue either one or all, yet when two join in a trespass, they so make one trespasser, as either of them is as well answerable for his fellow's fact as for himself. And therefore a release to one dischargeth the whole trespass; and also a release is as good a satisfaction in law as a satisfaction in deed; and therefore if an executor release, the debt released is judged assets in his hand. Now against joint trespassers, there can be but one satisfaction, and therefore if they be sued in one action, though they may sever in pleas and issues, yet one jury shall assess damages for all; and as to the damages, he that is no party to the issue shall have an attain as well as his fellows; and if they be sued in several actions, though the plaintiff make choice of the best damage, yet, when he hath taken one satisfaction, he can take no more, and, if he require two, an *audita querela* will lie.¹

¹ As to the effect of an instrument in the form of a present release of one joint wrongdoer, but importing an intention upon the part of the releasor to retain his right to sue the other wrongdoers; compare *Ruble v. Turner*, 2 Hen. & Munf. 38, and *Matthews v. Chicopee Mfg. Co.*, 3 Robertson N. Y. Superior, 711. See also, as to similar release to one of two joint contractors, Ames' Cases on Partnership, 606, note 2. — Ed.

SECTION V.

Effect of Satisfied Judgment against one of the Joint Wrongdoers.

MORTON'S CASE.

26 Elizabeth. Croke Elizabeth, 30.

TRESPASS against Morton for entering into his house, and taking away his goods. The defendant pleadeth the trespass was done by him and J. S., and the plaintiff had brought trespass against J. S., and recovered against him, and had execution, and is satisfied, and demands judgment if he might impeach him, &c. And upon this it was demurred. — *Plowden* moved, that this was a good plea; for when a trespass is done by two, this is joint, and it is also several: so that if the party be satisfied by one, this is a discharge against the other; and the trespass is so joint, that if the plaintiff doth confess that the defendant and another did the trespass, the writ shall abate; for it ought to be brought against both. 8 Hen. 5, pl. 9; 2 Hen. 7, pl. 16; *Foster's case*, 21 Edw. 4; 22 Edw. 4. In 2 Rich. 3, a difference is taken between a trespass by two, and a felony by two: for a felony by two is always several; and a pardon of one is no discharge of the other.

WRAY, C. J., conceived it reasonable, that the execution and satisfaction by one should discharge the other. — GAWDY, *contra*: For the trespass is always in itself several; and when the plaintiff hath recovered against one, and is satisfied for the damages he has done to him, this is nothing to the trespass done by the other: but a release to one is available to the other; for by the release he acknowledges himself satisfied. — CLENCH. If one command three to do a trespass, and they do it, and a recovery is had against him, and he being in execution doth satisfy the plaintiff, this is a good discharge of the others; for the commander was the principal trespasser, and the others did it but as his servants; which GAWDY seemed to agree, *et adjournatur*.

LIVINGSTON v. BISHOP.

1806. 1 Johnson, 290.¹

THE plaintiff brought separate actions of trespass against the defendant and five other persons, for a joint trespass. The defendant was

¹ Portions of the opinion are omitted. — ED.

the principal trespasser; the other defendants acted as his servants. Pending the suits, and before trial of either of them, the counsel on both sides entered into a written agreement, that the defendant Bishop should, upon the trial of the cause against him, be considered as answerable for the whole trespass committed by all the defendants; and in case a verdict should be found against him, and this Court should be of opinion that the plaintiff would be entitled to costs in the other suits, after a trial and recovery against Bishop, as a joint trespasser, for the whole damages, then the other defendants were to pay the costs of their respective suits, otherwise not. The cause afterwards proceeded to trial, and a verdict was found against Bishop, the defendant; on which judgment was entered up, and an execution awarded, which has been paid and satisfied.

This case was submitted to the Court without argument.

KENT, C. J. On looking into the books, with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but everywhere admitted, that for a joint trespass the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried may be used by way of plea *puis darrein continuance*, to defeat the other actions that are in arrear. The more rational rule appears to be, that where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made this election, he is concluded by it, and that if he should afterwards proceed against the other defendants, they shall be relieved on payment of their costs. This is agreeable to the rule laid down in *Sir John Heydon's case*, 11 Co. 5, where, in trespass against several, one appeared and pleaded not guilty to a declaration against him, with a *simul cum*, &c., and afterwards another appeared and pleaded not guilty to a like declaration, whereupon separate *venires* issued, and the issues were separately tried, and separate and different damages assessed, and the Court resolved that the plaintiff had his election of the different damages assessed, which should bind all, and that there should be but one execution.

The case of *Brown v. Wotton*, Yelv. 67; Cro. Jac. 73; Moor, 762, stands, however, opposed to this view of the subject, and it merits some attention. That was an action of trover for certain goods, and the defendant pleaded a judgment and execution in behalf of the plaintiff, against one I. S. for the same goods, and the plea was held

good.¹ [The learned judge then criticised the decision in *Brown v. Wotton* ; and cited authorities tending to show that the plea should have averred, not only judgment, but also satisfaction.]

I am therefore inclined to question the extent of the decision in *Brown v. Wotton*, and to hold that a recovery against one joint trespasser is not alone a bar to a suit against another. There must, at least, be an execution thereon to bring a case within the facts on which that decision was founded ; and that, perhaps, may be deemed an election by the plaintiff, *de melioribus damnis*, and sufficient to conclude him. The trial and recovery in the present case was, therefore, no bar to the other suits which were pending, and I conclude that the plaintiff is entitled, under the agreement, to the costs of the other suits. In the analogous case of a recovery in separate suits against the drawer and indorser of a note, the costs of both suits were to be paid. *Windham v. Wither*, Str. 515. Our statute, Laws, sess. 24, c. 90, s. 14, vol. i. 354, allows a recovery of costs in one of the suits only ; but this statute was an alteration of the former law, and it does not apply to suits in trespass. The case of a *unica taxatio damnorum* is, where the trespassers are sued jointly, and they sever in their pleas, and separate damages are assessed ; and the reason of this is, that in judgment of law, the several juries give but one verdict at one time. 10 Co. 117 a ; 11 Co. 7 a. There is no case that I have met with that requires a single taxation of costs where there are separate suits in trespass, or that excludes the plaintiff from his costs in all the suits in this case, any more than in the case of separate suits on one obligation, antecedent to our statute. The fact annexed to the case, that execution had been issued, and satisfaction received of the judgment against Bishop, is not material, as the present question arises upon the agreement.

The opinion of the Court, accordingly, is, that the plaintiff is entitled to his costs in each of the suits, up to the time of the agreement, together with the costs of the present application.

THOMPSON, J., and TOMPKINS, J., concurred.

LIVINGSTON, J., and SPENCER, J., gave no opinion.

Rule granted.

¹ In the case of *Drake v. Mitchell and others*, 3 East's Rep. 258, Lord Ellenborough says, that a judgment alone is no bar until it be made productive in satisfaction to the party, and until then cannot operate to change any other collateral concurrent remedy which the party may have.

SECTION VI.

Effect of Unsatisfied Judgment against one of the Joint Wrongdoers.

BRINSMEAD v. HARRISON.

1872. *Law Reports*, 7 *Common Pleas*, 547.

IN the Exchequer Chamber.

Error upon a judgment for the defendant in the Court of Common Pleas.

Detinue for a pianoforte. Plea, that the act complained of was the joint act of the defendant and one Thompson, and that the plaintiff had recovered judgment in respect of it in an action against Thompson, which judgment still remained in force. Replication, that the judgment was still unsatisfied. Demurrer and joinder: see *Law Rep.* 6 C. P. 584.

Kelly (*Shaw* with him), for plaintiff.

[Argument omitted.]

Powell, Q. C. (*Joyce* with him), *contra*, was not called upon.

KELLY, C. B. In this case a right of action has accrued to the plaintiff in respect of the wrongful detention of a pianoforte. This act was the joint act of two wrongdoers, the defendant and another. The defendant by way of plea alleges that an action was brought for the same cause against the other wrongdoer, and a judgment obtained against her, which remains in full force: and the question is whether that affords any defence to this action. That a judgment and execution, with satisfaction, would be a defence, is not disputed. A long series of authorities has so laid down: but it was doubted at one time whether judgment and execution, without satisfaction, was a bar also. It will be right, therefore, to consider whether this latter is not upon principle a good and valid defence. If it were held not to be a defence, the effect would in the first place be to encourage any number of vexatious actions wherever there happened to be several joint wrongdoers. An unprincipled attorney might be found willing enough to bring an action against each and every of them, and so accumulate a vast amount of useless costs, if judgment against one of them did not operate as a bar to proceedings against the others. The mischief would not even rest there. Judgment having been recovered against one or more of the wrongdoers, and damages assessed, if that judgment afforded no defence, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages. Which amount is the plaintiff to levy? There are other grounds upon which it would be extremely inconvenient and unjust if a second action could be maintained. But, independently of the mis-

chief which would result from holding the law to be as contended for by Mr. Kelly, let us see how the authorities stand. In the first place, there is no authority whatever — since the reigns of the Henrys and the Edwards nothing approaching to an authority has been cited — to show that such a plea as this would not be a good defence. In the absence, therefore, of authority to the contrary, and upon principle, and also upon what I conceive to be binding authorities in its favor, I come to the conclusion that such a plea as this affords a good defence. In the first place, we have the case of *Brown v. Wootton*, as reported in Cro. Jac. 73. There, as here, a joint wrong had been committed by two persons. An action was brought against one, and a judgment obtained, but no satisfaction. A second action was brought against the other wrongdoer for the same cause, and he pleaded, as here, the judgment recovered in the first action. The judgment of the Court is in these terms: — “All the Court held the plea to be good; for, the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced *in rem judicatam*, and to a certainty.” And Popham, C. J., adds: “If one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *e contrà*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other, and the alleging that he hath the one in execution for this cause is not an answer to the purpose: and the difference betwixt this case and the case of debt upon an obligation against two is, because there every one of them is chargeable with and liable to the entire debt, and therefore a recovery against one is no bar against the other until satisfaction.” This appears to me to be a satisfactory and binding authority: and the more so because I find that one hundred and fifty years afterwards it is quoted in a book of the highest authority, viz., Comyns’s Digest, which alone would make it a satisfactory guide for us upon the present occasion. But it does not stop there, for I find *Brown v. Wootton*, Cro. Jac. 73; Yelv. 67; Moore, 762, and all the older cases referred to in *King v. Hoare*, 13 M. & W. 494, where the question was fully and elaborately considered in the Court of Exchequer, and a judgment was pronounced by one of the most learned judges that ever sat in Westminster Hall. It is unnecessary to go through the enlightened and elaborate reasoning of that very learned person. Suffice it to say that he deals with the whole law upon the subject; and the result is thus summed up in the marginal note of the report of that case, — a judgment in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause. There being, then, this series of authorities, satisfactory of themselves, and having the sanction and approval of Chief Baron Comyns and Lord Wensleydale, notwithstanding the respect we entertain for the opinions and decisions of the American Courts, where

a different view of the law seems to be entertained, I think we are bound to follow those of our own Courts, and to hold that, upon principle as well as upon authority, this plea is a good answer to the action, and consequently that the defendant is entitled to judgment.

BLACKBURN, J. I am of the same opinion. The question raised upon this record is whether the claim of the plaintiff against two joint wrongdoers is put an end to by a judgment recovered in an action against one of them without showing that that judgment has been satisfied. I apprehend that it is, on the ground that transit *in rem judicatam*, or upon the general principle of convenience which is expressed in the maxim "*Interest reipublicæ ut sit finis litium.*" Is it for the general interest that, having once established and made certain his right by having obtained a judgment against one of several joint wrongdoers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong? I apprehend it is not; and that, having established his right against one, the recovery in that action is a bar to any further proceedings against the others. It is unnecessary to go into the earlier cases. But, in the reign of James I., it was distinctly decided in *Brown v. Wootton*, *supra*, that a judgment recovered in trover might be pleaded in bar to a second action against a different person for the same cause, without averring satisfaction; "for," say the Court, "the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced *in rem judicatam*, and to a certainty." Whether that which is added by Popham, C. J., is right or wrong, there is a distinct decision of the Court of Queen's Bench: and in the next century that great lawyer, Chief Baron Comyns, gives the high authority of his sanction to it. In more modern times, Baron Parke, probably the most acute and accomplished lawyer this country ever saw, holds the same doctrine in *King v. Hoare*, *supra*. I find no *dictum* of authority and no decision the other way. If this were *res integra*, I should have considered the American cases referred to entitled to great respect. But, for the reason given by the Court in *Brown v. Wootton*, *supra*, which works no injustice, and which has been acted upon for centuries, although no decision of a Court of Error has been pronounced upon it, I think we are bound, even sitting in a Court of Error, to decide in conformity with it. I observe that the Court of Common Pleas, in their judgment upon the demurrer to the new assignment, which is not now before us, held that by the recovery in the first action without satisfaction the property in the chattel did not pass. I should be inclined to agree to this, but it is unnecessary to express an opinion upon it.

MELLOR, J., and CLEASBY, B., concurred.

LUSH, J. I entirely agree with the rest of the Court. I think the matter is concluded by authority, the law as laid down in *Brown v. Wootton*, *supra*, in the time of James I., having been recognized since

by the high authorities referred to. If the reasons were not satisfactory to my mind, I might be induced to go along with the American decisions to which our attention has been called. But, after so long a series of decisions in our own Courts, I do not think we ought to yield to the opinions there expressed, whether they do or do not commend themselves to our judgment. The judges who decided those American cases seem to have thought that, by holding that recovery against one of two wrongdoers was a bar to an action against the other, they would be deciding that the property in the chattel passed by the recovery; but I do not think that by any means follows; and, as at present advised, I am prepared to adhere to the judgment of the Court below upon both points.

Judgment affirmed.

LOVEJOY v. MURRAY.

1865. 3 Wallace, 1.¹

LOVEJOY brought suit in one of the Courts of Iowa against O. H. Pratt, and the sheriff attached certain personal property, which was assumed to be the property of Pratt. A certain Murray, however, claimed it as his. The sheriff, now in possession, was unwilling to proceed further in the attachment, or to sell the property under it, unless indemnified by Lovejoy & Co. These parties accordingly executed a bond, in which, reciting that the sheriff had attached and taken possession of the property, they bound themselves to pay all damages, &c. The sheriff then proceeded to sell the property under Lovejoy & Co.'s attachment, and under direction of their attorneys.

This being done, Murray sued the sheriff for an alleged trespass. The sheriff gave notice of this suit, as soon as brought, to Lovejoy & Co., and they defended it; counsel, whom they paid, having taken exclusive charge of it. In this suit, Murray obtained

Judgment against the sheriff for	\$6233
Which the sheriff, without execution issued, satisfied to the extent of	830
Leaving a balance unsatisfied of	\$5403

Murray then brought suit against Lovejoy & Co. for this same trespass; and the facts being agreed on in a case stated, the Court gave judgment for the plaintiffs for the amount of the judgment against the sheriff less the \$830 paid by him.

On error here from the Massachusetts Circuit (where Lovejoy & Co. had been sued), three questions were made.

¹ Only so much of the opinion is given as relates to a single question. The arguments are omitted. — Ed.

1. Did Lovejoy & Co., in giving the bond of indemnity to the sheriff, become thereby liable as joint trespassers with him in what was done under the attachment?

2. Did Murray, by suing the sheriff alone, and getting partial satisfaction of the judgment against that officer, bar himself of a right to sue Lovejoy & Co. for the same trespass?

3. Was Murray's judgment against the sheriff conclusive against Lovejoy & Co. in this suit against them?

The case was thoroughly argued on both sides, in this Court, on the authorities, ancient and modern, English and our own.

Mr. Hutchins, for plaintiffs in error.

Mr. Ball, contra.

MILLER, J. The record before us raises three questions, all of which depend upon the principles of the common law exclusively for their solution.

[Omitting the opinion on the first question.]

2. Did the plaintiff, by suing Hayden, the sheriff, alone, recovering judgment for about six thousand dollars, and receiving from him eight hundred and thirty dollars on the said judgment, thereby preclude himself from maintaining this suit against these defendants for the same trespass? Is the judgment, or the judgment and part payment, in that case a bar to this action?

Parke, Baron, in the case of *King v. Hoare*, 13 Meeson & Welsby, 502, speaking in reference to the same proposition in its application to actions on joint contracts, says, in 1846, that it is remarkable that the question should never have been decided in England. It is equally remarkable that the proposition here presented should be an open question at this day.

The faithful and exhausting research of counsel, in this case, shows that there are conflicting authorities, not only on the main proposition, but on several incidental and collateral points closely connected with it. Two propositions, however, seem to be conceded by all the authorities, which bear with more or less force on the main question, and which may as well be stated here.

1. That persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may be all sued in one action; or one may be sued alone, and cannot plead the nonjoinder of the others in abatement; and so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.

2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause.

In the latest English case upon the principal question, namely, *Buckland v. Johnson*, 15 C. B. 145, Jervis, C. J., holds the former judgment against the son, although fruitless, to be a bar to the second suit against the father for the same goods, upon the ground that by the former judgment the property in the goods was vested in the defendant in that action. As this is the latest case in the English Courts which expressly decides the point, it may, perhaps, be received as the English doctrine. But this concession must be made with some hesitation in view of opinions expressed in other cases decided in the same country. In the very case in which that judgment is rendered, the Chief Justice takes occasion to correct what he supposes to be an erroneous statement of Tindal, C. J., in *Cooper v. Shepherd*, to the effect, "that, according to the doctrine of the cases which were cited in argument by a former recovery in trover and payment of damages, the plaintiff's right of property vests in the defendant in that action."

It was, therefore, the opinion of C. J. Tindal, that payment of the damages recovered is essential to vest the property in defendant, and this only a few years before the case of *Johnson v. Buckland* was decided. That case was decided in 1854, and mainly on the authority of *Brown v. Wootton*, reported in Yelverton, as also by Croke, J. The reason for the decision, as given by Popham, C. J., is thus stated in the latter book: "In the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced *in rem judicatam*, and to certainty, which takes away the action against others." If the only object, or indeed the principal object, in obtaining a judgment in trespass, was to render certain the extent of plaintiff's injuries, or the amount of damages which would compensate for those injuries, we might be able to comprehend the force of this logic. But as it is the purpose of the law, and the main purpose for which Courts of justice are instituted, to procure satisfaction for these injuries, we do not see the sequence in the reasoning of the learned judge.

Brown v. Wootton was decided in Trinity Term, 3 James I. Prior to that time, the law had been thought to be the other way. See Brooke's Abridgment, Pl. 98; Morton's Case, Cro. Eliz. 30. In *Claxton v. Swift*, 2 Shower, 494, Shower said, "It was never pretended, until the case of *Brown v. Wootton*, that a bare judgment should be a bar."

In *Cocke v. Jenner*, reported by Hobart, and which was in Trinity Term, 12 James I. (only nine years after *Brown v. Wootton*), the question arose on a release of one joint trespasser, which was held to be a bar to a suit against the other, on the ground that it was equivalent to satisfaction; yet the language of the report leaves a strong impression that it was the opinion of the Court that several judgments might be had, and that only satisfaction, or its equivalent, would bar proceedings against all who were liable. And the case of *Corbett v. Barnes*, cited

from Sir W. Jones (time of Charles the First), which was on *audita querela*, while it holds that only one satisfaction can be had, implies clearly that several judgments may be rendered against joint trespassers. Indeed, that very case was where one judgment had been rendered in the King's Bench against one, and in the Common Pleas against three others, for the same trespass.

These cases show that, after as well as before the case of *Brown v. Wootton*, the law was supposed, by some of the ablest judges in England, to be otherwise than what it decides; and we know of no case in which it was followed in England as implicit authority, until *Buckland v. Johnson*, in 1854.

The rule in that case has been defended on two grounds, and on one or both of these it must be sustained, if at all. The first of these is, that the uncertain claim for damages before judgment has, by the principle of *transit in rem judicatam*, become merged into a judgment which is of a higher nature. This principle, however, can only be applicable to parties to the judgment; for as to the other parties who may be liable, it is not true that plaintiff has acquired a security of any higher nature than he had before. Nor has he, as to them, been in anywise benefited or advanced towards procuring satisfaction for his damages, by such judgment.

This is now generally admitted to be the true rule on this subject, in cases of persons jointly and severally liable on contracts; and no reason is perceived why joint trespassers should be placed in a better condition. As remarked by Lord Ellenborough, in *Drake v. Mitchell*, 3 East, 258, "A judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have."

The second ground on which the rule is defended is, that by the judgment against one joint trespasser, the title of the property concerned is vested in the defendant in that action, and therefore no suit can afterwards be maintained by the former owner for the value of that property, or for any injury done to it.

This principle can have no application to trespassers against the person, nor to injuries to property, real or personal, unaccompanied by conversion or change of possession. Nor is the principle admitted in regard to conversions of personal property. Prior to *Brown v. Wootton*, the English doctrine seems to have been the other way, as shown by Kent in his Commentaries, 2 Kent, 388, referring to Sheppard, Touchstone, Title "Gift," and Jenkins, page 109, case 88.

We have thus far confined ourselves to the examination of the English authorities, and the principles discussed in them, and we are forced to the conclusion that even at this day the doctrine there is neither well settled nor placed on any satisfactory ground.

In turning our attention to the American cases, we have been able

to find but two in which the point directly in issue has been ruled in favor of the bar of the former judgment; although there are some other cases which hold that the right of property is transferred by the judgment. The first of these two cases is *Wilkes v. Jackson*, 2 Hening & Munford, 355. This was an early case in the Court of Appeals of Virginia, which seems to have passed without much consideration, and was mainly rested on the judgment of the same Court in a former case, which does not appear to sustain it.

The other is the Rhode Island case of *Hunt v. Bates*, 7 Rhode Island, 217. It is a very recent case, decided in 1862; but the absence of any other reasoning than a mere recapitulation of the English cases, and the remark that upon their authority the Court is obliged to rest its decision, deprives it of any other weight than what should be attached to those cases. This we have already considered.

In addition to this, it has been decided in South Carolina and Pennsylvania, that the recovery of a judgment for the value of the goods converted transfers the title to the defendant. *Rogers v. Moore*, 1 Rice, 60; *Floyd v. Brown*, 1 Rawle, 121.

On the other hand, in the case of *Livingston v. Bishop*, 1 Johnson, 290, in the Supreme Court of New York, in 1806, Kent, C. J., overrules *Brown v. Wootton*, and holds that judgment alone is not a bar.

In *Sheldon v. Kibbe*, 3 Connecticut, 214; decided in 1819, in the Supreme Court of Connecticut, the Court, by Hosmer, C. J., enters into an elaborate examination of the authorities, and a full consideration of the question on principle, and lays down the doctrine that neither a judgment, nor the taking of the body of the defendant in execution, will bar a second action against a co-trespasser. Nothing short of satisfaction or release can have that effect.

In *Sanderson v. Caldwell*, 2 Aiken, 195, in the Supreme Court of Vermont, in 1826, it is held that neither judgment, nor issuing execution, nor anything short of satisfaction, is a bar to a second suit brought against another joint trespasser.

Osterhout v. Roberts, 8 Cowen, 43, a year later, in the Supreme Court of New York, was a plea that defendant's son had been sued, had a judgment rendered against him, and had been taken in execution and imprisoned sixty days for the same trespass. Yet the plea was held bad. The trespass was for taking a watch.

In *Elliott v. Porter*, 5 Dana, 299, Robertson, C. J., of the Court of Appeals of Kentucky, examines the whole subject fully, both on principle and authority, and holds that the first judgment is no bar, and that the title to the property does not pass by judgment in trespass or trover. This case is affirmed by the same court, in *Sharp v. Gray*, 5 B. Monroe, 4.

Blann v. Cochern, in Alabama, 20 Alabama, 320, was an action of trespass. The defendant pleaded a former recovery against a co-trespasser, and payment of the judgment and costs so recovered, to the

clerk of the court. But the plea was held bad, because it was not averred that it was accepted by the plaintiff.

In *Knott v. Cunningham*, 2 Sneed, 204, the Supreme Court of Tennessee held that a former judgment against one tort-feasor was no bar to a suit against another, for the same tort, without satisfaction.

In *Page v. Freeman*, 19 Missouri, 421, the Supreme Court of Missouri held the same doctrine.

In *Floyd v. Browne*, 1 Rawle, 125, Gibson, C. J., of Pennsylvania, while holding that after a judgment in trover against two trespassers without satisfaction, plaintiff cannot bring assumpsit against another trespasser, uses this language: "A plaintiff is not compelled to elect between actions that are consistent with each other. Separate actions against a number who are severally liable for the same thing, or against the same defendant on distinct securities for the same debt or duty, are concurrent remedies. Trespass is, in its nature, joint and several, and in separate actions against joint trespassers, being consistent with each other, nothing but satisfaction by one will discharge the rest." Trover and assumpsit, however, he holds to be inconsistent remedies.

If we turn from this examination of adjudged cases, which largely preponderate in favor of the doctrine that a judgment, without satisfaction, is no bar, to look at the question in the light of reason, that doctrine commends itself to us still more strongly. The whole theory of the opposite view is based upon technical, artificial, and unsatisfactory reasoning.

We have already stated the only two principles upon which it rests. We apprehend that no sound jurist would attempt at this day to defend it solely on the ground of *transit in rem judicatam*. For while this principle, as that other rule that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we do not perceive its force when applied to a suit brought for the first time against another trespasser in the same matter.

In reference to the doctrine that the judgment alone vests the title of the property converted, in the defendant, we have seen that it is not sustained by the weight of authorities in this country. It is equally incapable of being maintained on principle.

The property which was mine has been taken from me by fraud or violence. In order to procure redress, I must sue the wrongdoer in a Court of law. But, instead of getting justice or remedy, I am told that by the very act of obtaining a judgment—a decision that I am entitled to the relief I ask—the property, which before was mine, has become that of the man who did me the wrong. In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrongdoer. It is sufficient to state the proposition to show its injustice.

It is said that the judgment represents the price of the property, and as plaintiff has the judgment, the defendant should have the property.

But if the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts. 2 Kent, 388-389; Greenleaf on Evidence, § 533; *Hyde v. Noble*, 13 New Hampshire, 500; *Hepburn v. Sewell*, 5 Harris & Johnson, 211.

But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser, or a release to his co-trespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was party to the first judgment.

The second question must, therefore, be answered in the negative.

[Omitting opinion on the third question.]

Judgment affirmed.

BLANN v. CROCHERON.

1852. 20 Alabama, 320.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. Robert Dougherty.

George W. Gayle, for plaintiff in error.

Byrd, contra.

LIGON, J. The plaintiff sued the defendant in trespass, and it appears from the record that he had also brought suit, and recovered judgment against one Quartermas for the same trespass, in a separate action; but it nowhere is shown that execution was sued out by the plaintiff to enforce the collection of his judgment against Quartermas. It further appears that the amount of that recovery, both as to damages and costs, had been paid to the clerk of the Circuit Court in which it was had, before the trial of this cause in the Court below; and

the defendant pleaded *puis darrein continuance*, "that since the bringing of the action in this case, the plaintiff has received full satisfaction of the trespass complained of in this suit, by a judgment against Isaiah Quartermas, the constable, a joint trespasser, which judgment has been satisfied in full by payment of the amount of the judgment, and the costs in said case, to the clerk of the Court in open court."

To this plea a demurrer was interposed by the plaintiff, which was overruled by the Court.

When this case was here at the last term of this Court, it was held, that the plaintiff might sue the joint trespassers severally, and have several recoveries, but could receive but one satisfaction for the injury done; "that a recovery against one, without a satisfaction of that recovery, would form no bar to his proceeding to judgment against the other. And having judgment against both, the plaintiff might then elect *de melioribus damnis*, and issue his execution against one, which would amount to a determination of his right to elect, and preclude him from proceeding against the other, except for cost."

Since that time it appears, that the co-trespasser, against whom the plaintiff had recovered his judgment, has voluntarily paid the damages and costs to the clerk, and this is pleaded as an estoppel in this action.

The only question presented for our consideration is, does the payment to the clerk, without instructions from the plaintiff to him to receive the money paid as a satisfaction of the judgment against Quartermas, determine the election of the plaintiff, and estop him from further proceedings against the defendant? Or, in other words, can the clerk and the defendant in the judgment make the election for the plaintiff, without his authority, and, as far as we are advised by the record, against his will? We think the clerk has no such power, and as the plaintiff was entirely passive, refusing to issue execution against Quartermas, his right can be in no wise affected by the acts of that individual and the clerk, unless it is averred and shown, that such acts were done with his sanction and by his authority. Were the law otherwise, it would enable joint trespassers, who were sued separately, to hasten the trial of the one least guilty among them, and by satisfying, in the clerk's office, the damages and costs adjudged against him, to free themselves from all responsibility for their own greater guilt. In fact, it would change the rule of law, which gives the right of election in such cases to the plaintiff, and bestow it upon the defendant.

To determine the plaintiff's right to elect, he must act. Were he to order execution to issue on the judgment in his favor; or, in case of payment to the clerk, as in this case, were he to accept the money, his election would be considered as having been made; and it might be specially pleaded by a co-trespasser, against whom a suit was then pending, as an estoppel. But to make the plea good, it should aver that the sum so paid in satisfaction was accepted by the plaintiff as such. The plea in this case lacks that averment, and is consequently bad on demurrer.

For the error of the Court below, in overruling the plaintiff's demurrer to the defendant's plea *puis darrein continuance*, the judgment must be reversed, and the cause remanded.

SECTION VII.

Effect of Partial Satisfaction by one of the Joint Wrongdoers.

ELLIS v. ESSON.

1880. 50 *Wisconsin*, 138.¹

APPEAL from the Circuit Court for Oconto County.

The case is thus stated by Mr. Justice Taylor: —

“ This is an action to recover damages for a trespass upon the plaintiff's real estate, and cutting and carrying therefrom a certain quantity of pine saw logs. The evidence shows that the trespass complained of was committed jointly by the defendants and one E. E. Comstock, and that the plaintiff had made an agreement with Comstock, as found by the jury in their special verdict, which was as follows: —

“ ‘ 1. That prior to the commencement of this action it was agreed by and between the plaintiff and E. E. Comstock that the latter would pay to plaintiff the sum of \$200, and that in consideration thereof plaintiff would not sue said Comstock for the trespass upon, or for the timber taken from, the premises described in the complaint.

“ ‘ 2. That it was not understood by and between said plaintiff and Comstock, at the time of making said agreement, that said sum of \$200 compensated or satisfied said plaintiff for said trespass, or for said timber, or that \$200 was the amount of damages sustained by the plaintiff by reason of the trespass or value of the timber, but simply that for the payment of that amount by Comstock the plaintiff agreed not to look to or prosecute him for the balance of the damages, but to look wholly to other parties therefor.

“ ‘ 3. That at the time of said agreement it was understood by both said plaintiff and said Comstock that the plaintiff intended to look to other parties connected with said trespass for the balance of his damages, over and above the amount received from Comstock.

“ ‘ 4. That Comstock paid said sum of \$200 to the plaintiff, and he received the same, in execution of said contract.

“ ‘ 5. That at the time of making the above arrangement by plaintiff with Comstock the extent of the plaintiff's damages by reason of the trespass had not been ascertained, and that said damages remained then unliquidated.’

¹ Arguments and part of opinion omitted.

"The jury also found that 269,935 feet, board measure, of pine logs had been cut and removed from the plaintiff's premises by the defendants and Comstock, or their servants or employees, and that the value of said logs so cut and removed by defendants was \$1,079.64.

"Upon these findings both parties moved for judgment; and the Court ordered judgment in favor of the plaintiff for the value of the timber so cut and removed, less the sum of \$200, which the respondent had received from Comstock under said agreement. The defendants appeal; and the only ground of error alleged or argued in this Court is, that the agreement made by the plaintiff with Comstock, a joint trespasser with the appellants, and the receipt of the \$200 under such agreement, is a bar to this action."

W. H. Webster, for appellants.

Hastings & Greene, for respondents.

TAYLOR, J. [After stating the positions taken by counsel, and discussing the rule that a release under seal given to one of several joint wrongdoers discharges all.] There is no dispute in the authorities on this question. All hold that a technical release of one of two or more joint wrongdoers, under seal, discharges them all, and is a good bar to an action against any or all of them; and the reason of the rule is above stated. Upon the production of the release the law conclusively presumes that the injured party has been fully satisfied for the wrong done, and this legal presumption cannot be changed or disproved by any parol evidence. See *Cocks v. Nash*, 9 Bing. 341; *Brooks v. Stuart*, 9 A. & E. 854.

It is insisted by the counsel for the respondent that when the contract which is set up as a release of one of several joint wrongdoers is not a technical release, the construction of which is fixed by the law, then the intention of the parties is to govern; and if it be clear that there was no intention on the part of the injured person to release his cause of action against all the wrongdoers, and that the sum received was not in fact a full compensation for his injury, nor intended to be such by the parties, then any agreement of the injured party not to prosecute one or more of several wrongdoers, in consideration of the payment of a specified sum of money, does not discharge the other wrongdoers, except to the extent of the money so received. In other words, when the contract is not of such a nature that the law deems it conclusive evidence that the injured person has been satisfied for the wrong, then it becomes a question of fact for the Court or jury whether what he has received of the one wrongdoer was received in full satisfaction of his wrong; and if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrongdoers. And this view of the case, we think, is sustained by the great weight of authority, in all cases where the amount of the damages is the subject of proof and computation, as in this case, though there is some conflict in those cases where the damages are not the subject of proof and computation, but rest mostly in the discretion of the jury, as in cases of assault and

battery, slander, libel, false imprisonment, and other actions of that nature.

It is probable that one reason why the rule above stated has not been so universally adopted by the Courts in the class of actions above named is, that in such cases the real amount of injury which the plaintiff has sustained is so much a matter of uncertainty that it would be very difficult to tell, before a verdict was obtained, what they were, and any sum received from one of the wrongdoers to buy his peace might well be considered a full compensation for the injury sustained. In cases where there is no technical release and discharge of one of several joint wrongdoers, whether the receipt of money from one accompanied with an agreement not to prosecute him for the wrong, is a discharge of the other wrongdoers, depends upon the question whether such money was received as an accord and satisfaction for the whole injury. If it was, then all are discharged; if it was not, but only as a part satisfaction, then it is a discharge of the others only *pro tanto*. A Court or jury would more readily infer that a receipt of \$200 from a party who had assaulted and beaten another by the party injured was intended as a satisfaction for the whole injury done, than if the same sum of money had been received by the injured party of one of two or more persons who had tortiously converted a thousand bushels of wheat worth \$1,000. See *Brown v. Cambridge*, 3 Allen, 475; *Stone v. Dickinson*, 5 Allen, 29. The distinction made by the Courts between the class of cases above mentioned, where there is no fixed legal measure of damages, and those where there is a fixed legal measure, is considered and commented upon in the following cases: *McCrillis v. Hawes*, 38 Me. 568; *Gilpatrick v. Hunter*, 24 Me. 18; *Eastman v. Grant*, 34 Vt. 390; *Ellis v. Bitzer*, 2 Ohio, 295; *Knickerbacker v. Colver*, 8 Cow. 111.

In the case of *Eastman v. Grant*, *supra*, which was an action for assault and battery, in commenting upon the effect which must be given to the contract made with two of the joint wrongdoers, by which, in consideration of \$100 paid by each, the plaintiff agreed not to prosecute them, and to save them harmless from all liability to the plaintiff for all damages sustained by reason of the assault and battery, the Court says: "The plaintiff's claim rests solely in damages. There was no criterion by which the amount could be definitely determined. It was a matter of mere estimation, based on opinion and judgment, not of computation based on any fixed *data*. If the question were submitted to a jury they could determine it only by estimation. Here the plaintiff and the Bowens got together and determined the matter for themselves. They estimated the damages and fixed the amount of the plaintiff's claim against them, and they paid it and were discharged. . . . There is nothing in the case to indicate that the amount paid was not the full amount of the damages, and the extent of the plaintiff's claim on them. If the plaintiff had brought his action against the Bowens and had recovered \$200 damages, and they had paid the judgment, that

clearly would have discharged all. If these parties agree upon the amount without the intervention of a Court or jury, and the amount is paid, the effect, we apprehend, must be the same. The plaintiff's claim is the same against all the parties engaged in the trespass. He may pursue them jointly or severally to enforce it, but when that claim is once paid it is cancelled as to all the parties."

It will be seen from the opinion of the Court in this case that the reason for holding that the settlement by the two joint wrongdoers was a bar to the action against the others, was put upon the ground that the evidence showed that the plaintiffs had received from the two what was agreed upon between the parties to be a full compensation for the injury the plaintiff had sustained by the assault and battery, and not solely upon the ground that the plaintiff had agreed not to prosecute these parties further for such injury. The rule governing in actions of tort is briefly stated by Judge Cooley in his work on Torts, 139: "The bar arises not from any particular form that the proceedings assume, but from the fact that the injured party has actually received satisfaction, or what in law was deemed the equivalent." Story on Contracts, § 997, says: "A parol release to one of several joint obligors will never operate as a complete discharge of the others unless the debt be fully satisfied by him. If it be partially satisfied, it may *pro tanto* be pleaded in discharge of the others." The Courts have uniformly applied the same rule to actions of tort.

Robertson, C. J., in 3 Robt. 713, says: "The sole ground of the effect of a release of one of several joint contractors or wrongdoers in discharging all, is that it was, in presumption of law, a satisfaction; and whenever a release was in such form, or accompanied by such restrictions, as to repel such presumption, it did not necessarily discharge all."

Parsons, in his work on Contracts, vol 1, p. 29 (6th ed.), says: "If an action be brought against many, and to this an accord and satisfaction by one be pleaded in bar, it must be complete, covering the whole ground, and fully executed. It is not enough if it be in effect only a settlement with one of the defendants for his share of the damages; nor would it be enough if it were only this in fact, although in form an accord and satisfaction of the whole."

Justice Miller, in the case of *Lovejoy v. Murray*, 3 Wall. 1-17, says: "When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or that which the law must consider as such."

It is not claimed by the learned counsel for the appellants that the contract made between the plaintiff and Comstock shows that the plaintiff received the \$200 as satisfaction in full for his damages, or that it was understood between the parties that the \$200 was a full compensation therefor, or that the plaintiff intended to relinquish his

right to claim further compensation and damages from the defendants for his injury. The finding of the jury is express that it was understood at the time that the plaintiff intended to look to the defendants for the balance of his damages over the \$200 received of Comstock.

But it is insisted by the counsel for the appellants that because the plaintiff bound himself by a valid contract not to prosecute Comstock for the trespass, he was discharged from all further liability to the plaintiff on account of such trespass, and the other wrong-doers were also discharged, notwithstanding it was not so agreed or intended by the parties. It is possible that this rule might apply to a case of two or more persons who were jointly and not severally bound by contract. If in such case, the person to whom the parties were jointly bound should make a contract upon sufficient consideration, by which he discharged one, no action could be maintained against the other joint contractors, because the rules of practice in such cases require that all the joint-contractors shall be sued together, and the other parties may insist upon such joinder of parties. If, therefore, one of the joint contractors has been discharged from further liability by the plaintiff, so that the joint action cannot be maintained against him, it must fail as to all. *Bowen v. Hastings*, 47 Wis. 236. In such cases, however, when it is apparent that it was not the intention of the parties to discharge or satisfy the debt or claim, but only to relieve one party from all liability to pay the same, the Courts have usually avoided the difficulty by construing such contract as a simple contract not to sue the party discharged, and permit the action to proceed against all the parties notwithstanding the contract, leaving the discharged party to his action against the plaintiff for any damage he may sustain by reason of his being sued contrary to the conditions of such contract. *Line & Nelson v. Nelson & Smalley*, 38 N. J. Law, 358; *Solly v. Forbes*, 2 Brod. & Bing. 38 (6 E. C. L. 11); *Couch v. Mills*, 21 Wend. 424; *Price v. Barker*, 1 Jurist, 775 (N. S.); *Dean v. Newhall*, 8 T. R. 168. Admitting that the rule contended for by the learned counsel for the appellants would apply to the case of joint contractors, it could have no application to joint wrongdoers, who are always held liable to the injured party severally as well as jointly.

The contract set up in this case shows that the plaintiff did not receive the \$200 from Comstock in satisfaction or as full compensation for the injury he had sustained by the trespass, and that it was not the intention to release the other joint trespassers from liability for the trespass. The plaintiff's agreement not to sue Comstock for the trespass, under the circumstances disclosed by the evidence in this case, does not, therefore, discharge the other joint trespassers except *pro tanto*. The Court below properly rendered judgment in favor of the plaintiff for the damages he had sustained by reason of the trespass, less the sum of \$200 received of Comstock. This rule is, we think, supported by the great weight of authority, as will be seen by an examination of the large number of authorities cited by the learned counsel

for the respondents. The following cases fully sustain the position stated: *Snow v. Chandler*, 10 N. H. 92; *McCrillis v. Hawes*, 38 Me. 568; *Spencer v. Williams*, 2 Vt. 209; *Chamberlin v. Murphy*, 41 Vt. 110; *Sloan v. Herrick*, 49 Vt. 328; *Matthews v. Chicopee Co.*, 3 Robt. 712; *Bloss v. Plymale*, 3 West Va. 393; *Shaw v. Pratt*, 22 Pick. 307; *Pond v. Williams*, 1 Gray, 630-636; *Bank v. Messenger*, 9 Cow. 37; *Line v. Nelson*, 38 N. J. L. 358; *Irvine v. Milbank*, 15 Abb. Pr. 378 (N. S.); *Solly v. Forbes*, 6 Eng. Com. Law, 11; *Thompson v. Lack*, 54 Eng. Com. Law, 551; *Bank v. Curtiss*, 37 Barb. 319, 320; *Gunther v. Lee*, 45 Md. 60-67.

Many other cases will be found in the books holding the same doctrine, and so far as we have been able to find there are very few which hold the contrary doctrine. Nearly all the cases in which it has been held that an agreement by the injured party discharging one or more of several joint trespassers was a discharge of all, proceed upon the ground that the contract evidencing the discharge showed that the plaintiff had received a full compensation and satisfaction for all his injuries from the person discharged. The case of *Gunther v. Lee*, last above cited, proceeds upon this distinction. In that case one of the joint wrongdoers had been released under seal, with a reservation that the release should not prejudice the plaintiff's right to proceed against the other wrongdoers for damages claimed by the plaintiff. The Court says: "Here the release expresses a consideration on its face which was received in full satisfaction of the wrong complained of;" and then holds the proviso in the release void, as repugnant to the legal effect and operation of the release itself.

As was insisted by the learned counsel for the respondent, with great clearness and ability, there is no hardship in this rule. Certainly the receipt of a partial satisfaction from one of two joint tort-feasors is no injury to the other who is afterwards sued for the trespass. On the other hand, it is to his benefit, as he has the advantage of what was paid by his associate in the wrong in reducing the judgment against him. The party injured is under no duty to the joint wrongdoer to proceed at all against his associate, and his refusal to proceed against him is no ground of defence. As it is wholly optional with the injured party to proceed against one of two joint wrongdoers for the whole of his damages, there is no equity in holding that because he has received a part satisfaction for his injury from the one not proceeded against, upon an agreement not to sue him for the wrong, the other may set up such receipt as a complete defence to the action. He is benefited and not injured by such proceeding. Again, suppose the injured party has obtained judgment against two wrongdoers, he is under no obligation to collect the damages equally of both; and if he should direct the execution to be levied and collected out of the property of one, he would have no redress, and no power to compel his co-defendant to contribute; or if the plaintiff in such case should direct the execution to be collected in part only out of the property of each, neither would have any

right to control the amount which should be so collected of the other. And certainly such discretion could not be set up as a bar by either to the collection of the part directed to be collected of his property.

The defendants suffered no damage in consequence of the contract made between the plaintiff and Comstock. The plaintiff is not, therefore, affected by any equity in favor of the defendants. As no technical release was given to the joint wrongdoer, and the contract proved clearly shows that the plaintiff did not receive the \$200 in satisfaction of, or as full compensation for, his injury, there was no defence to the plaintiff's action except as to the \$200 received, and of this the defendants had the benefit.

Notwithstanding any general remarks found in this opinion, it will be understood that the decision of the Court goes no further than holding that the facts of this case do not show a release of the defendants from liability for damages, and that the majority of the members of the Court do not now decide that a similar agreement made with one of two or more joint trespassers, in an action for an assault and battery, false imprisonment, or similar actions, in which the damages rest mainly in estimation and opinion, would not be a bar to an action against the others.

BY THE COURT. The judgment of the Circuit Court is affirmed.

CHAPTER XVII.

DISTINCTION BETWEEN TORT AND BREACH OF CONTRACT.

GREEN v. GREENBANK.

1816. 2 *Charles Marshall*, 485.

THIS was a special action on the case, and the first count of the declaration stated, That the plaintiff had bargained with the defendant to deliver to him a mare of the plaintiff, by him warranted sound, except as to one of her eyes, and also to pay the defendant £5 in exchange for a mare of the defendant; and the defendant, by falsely warranting his mare to be sound, exchanged her for that of the plaintiff, who paid the defendant £5 for the said exchange, whereas the defendant's mare at the time of the said exchange was unsound; by means of which the defendant falsely and fraudulently deceived the plaintiff in the said exchange, and thereby the said mare of the defendant became of no use to the plaintiff, &c. The second count stated that the defendant, at the time of the exchange, well knew that his mare was unsound. The defendant pleaded first, not guilty; secondly, that, at the time of the alleged exchanges and warranties, the defendant was an infant, under the age of twenty-one years. The plaintiff demurred generally to the plea of infancy, the defendant joined in demurrer, and the case now came on for argument.

Mr. Serjt. *Vaughan*, who was to have argued in support of the demurrer, admitted that unless the Court should think that the present case was distinguishable from those which had been decided on the subject, there must be judgment for the defendant; and he mentioned *Jennings v. Rundall*, 8 T. R. 335, where it was decided that a plaintiff could not convert an action founded on contract into tort, so as to charge an infant; and *Weall v. King*, 12 East, 452, where it was held that a declaration in case, alleging a deceit by means of a warranty made by two defendants upon a joint sale, was not supported by proof of a contract of sale and warranty by one only, — the action, though laid in tort, being founded on the joint contract alleged; and so in *Powell v. Layton*, 2 N. R. 365. The only question was, whether the allegation in the second count, that the defendant well knew his mare to be unsound, varied the case.

LORD CHIEF JUSTICE GIBBS. The cases which have been alluded to clearly show that, where the substantial ground of action rests on

promises, the plaintiff cannot, by changing the form of action, render a person liable who would not have been liable on his promise. This is a case in which the assumpsit is clearly the foundation of the action; for it is, in fact, an undertaking that the horse was sound. There is another very strong case in Rol. Ab. *Action sur Case* (D) 3; *Cross v. Androes*, that an infant is not liable on the custom of the realm, for the loss of goods committed to his care as an inn-keeper. That case was recognized by Lord C. J. Holt, in the case of a bill of exchange, *Williams v. Harrison*, Carth. 160, where it was contended that infancy was no plea to an action founded on the custom of merchants; the Court held the plea good, Lord Holt observing that the former case was still stronger. With respect to the allegation in the second count, that does not vary the case from that of *Weall v. King*, because the deceit was practised in the course of the contract.

The rest of the Court concurred. *Judgment for the defendant.*¹

POZZI v. JAMES SHIPTON AND MAURICE SHIPTON.

1838. 8 *Adolphus & Ellis*, 963.²

CASE. The declaration stated that, on, &c., the plaintiff caused to be delivered to the defendants, and the defendants then accepted and received of and from the plaintiff, a certain package containing a looking-glass of the plaintiff, of great value, to wit, &c., to be taken care of, and carried and conveyed by the defendants from Liverpool to Birmingham in the county of Warwick, and there, to wit, at Birmingham, to be delivered to one Peter Pensey for the plaintiff, for certain reasonable reward to the defendants in that behalf; and thereupon it then became and was the duty of the defendants to take due care of the said package and its contents whilst they so had the charge thereof for the purpose aforesaid, and to take due and reasonable care in and about the conveyance and delivery thereof as aforesaid; yet the defendants, not regarding their duty in that behalf, but contriving and fraudulently intending to deceive and injure the plaintiff in that behalf, did not nor would take due care of the said package and its contents aforesaid, whilst they had the charge thereof for the purpose aforesaid, or take due and reasonable care in and about the conveyance and delivery thereof as aforesaid; but, on the contrary thereof, the defendants, whilst they had the charge of the said package and its contents for the purpose aforesaid, to wit on, &c., took so little and such bad and improper care of the said package and its contents, and such bad and unreasonable care in and about the conveyance and delivery thereof as aforesaid, and so carelessly and negligently conducted themselves

¹ See also *Johnson v. Pie*, 1 Keble, 905, 913.

² Arguments omitted. — ED.

in the premises, that the said looking-glass, being of the value aforesaid, afterwards, to wit, on, &c., became and was broken and greatly damaged. To the damage of the plaintiff of £10, &c.

Pleas: 1. Not guilty. 2. That plaintiff did not cause to be delivered to defendants, nor did defendants accept from plaintiff, the said package, &c., to be taken care of and carried, &c., and safely to be delivered &c., for reward in that behalf, in manner and form, &c. Conclusion to the country. Joinder.

On the trial before Coleridge, J., at the Liverpool Summer assizes, 1836, the plaintiff failed to establish his case against one defendant, but obtained a verdict under the direction of the learned judge against the other, who was proved to be a common carrier. *Atcherley*, Serjt., in the ensuing term, moved for a rule to show cause why a nonsuit should not be entered, on the ground that the action was founded on a contract; that, if the declaration had been framed in assumpsit, the plaintiff could not have recovered against one only of the defendants; and that the rights of parties in this respect were not to be changed by varying the form of declaration. A rule *nisi* having been granted,

Alexander, showed cause.

Atcherley, Serjt., and *Crompton*, *contra*.

Cur. adv. vult.

PATTESON, J. This is an action against carriers for negligence. A verdict was found for the plaintiff against one of the defendants only; and, upon a rule for a new trial having been obtained, the case was argued in last Easter term before my Brothers Littledale, Coleridge, and myself.

The form of the declaration is in case, and differs from that used in *Bretherton v. Wood*, 3 B. & B. 54, in this, that it contains no positive averment that the defendants were carriers; whereas in *Bretherton v. Wood*, *supra*, there was an averment that the defendants were proprietors of a stage coach for the carriage and conveyance of passengers for hire from Bury to Bolton. The present declaration states simply that the plaintiff delivered to the defendants, and the defendants received from the plaintiff, goods to be carried for hire from A. to B. It is therefore consistent with the defendants being common carriers, or being hired on the particular occasion only. Upon the trial it was proved satisfactorily that the defendant against whom the verdict was found was a common carrier; and it does not appear to have been objected, at that time, that proof of an express contract between the plaintiff and the defendants was necessary in order to sustain the declaration. If such proof was not necessary, it can only be because the declaration may be read as founded on the general custom of the realm; and, if it may be so read, the Court after verdict must so read it; and then the case of *Bretherton v. Wood*, *supra*, is directly in point in favor of the plaintiff.

Upon consideration, we are of opinion that the declaration may be so read. The practice appears to have been in former times to set out

the custom of the realm; but it was afterwards very properly held to be unnecessary so to do, because the custom of the realm is the law, and the Court will take notice of it, and the distinction has for many years prevailed between general and special customs in this respect. Afterwards the practice appears to have been to state the defendants to be common carriers for hire, *totidem verbis*. That however was departed from in *Bretherton v. Wood*, *supra*, to a considerable extent, and certainly still farther upon the present occasion.

It may be that the present declaration could not have been supported on special demurrer for want of some such averment; but on this point we are not called upon to give any opinion. It does not state that the goods were delivered to the defendants at their special instance and request, nor contain any other allegation necessarily applicable to an express contract only, or even pointing to any express contract. We cannot therefore say that it shows the action to be founded on contract: and it is sufficient for the present purpose, if the language in which it is couched is consistent with its being founded on the general custom as to carriers.

Taking this declaration, therefore, to charge the defendants as common carriers, it follows that it is strictly an action on the case for a tort, and that one of several defendants may be found guilty upon it according to the doctrine established in *Bretherton v. Wood*, *supra*. The evidence warrants the verdict which has been found, and we cannot disturb that verdict. We purposely abstain from giving any opinion, whether the doctrine in *Govett v. Radnidge*, 3 East, 62, or that in *Powell v. Layton*, 2 N. R. 365, be the true doctrine, as we do not feel ourselves called upon to decide between them, supposing them to differ.

The rule must be discharged.

Rule discharged.

BOORMAN v. BROWN.

1842. 3 *Queen's Bench* (*Adolphus & Ellis, New Series*), 511.

THE plaintiffs in error declared in the Queen's Bench against the defendant in error:

For that, whereas before and at the time of the committing, &c., the said plaintiffs carried on the trade or business of linseed crushers, at Branbridges, in the county of Kent, and defendant during all that time carried on the trade or business of an oil broker, at London aforesaid; and whereas also, before the time of the committing, &c., to wit, on &c., plaintiffs had retained and employed defendant, as such broker as aforesaid, to sell at London aforesaid, for and on behalf of them, plaintiffs, certain quantities, to wit, 30 tuns, of linseed oil, and to deliver the

same in the port of London aforesaid, according to the terms of the contract or contracts of sale, to such person or persons as should become the purchaser or purchasers thereof, for certain reasonable commission and reward to defendant in that behalf, which retainer and employment defendant then accepted: and whereas also, before the committing, &c., to wit on, &c., defendant, as such broker as aforesaid, in pursuance of the said retainer and employment, and being duly authorized by plaintiffs and one James Graham Peacock in that behalf, made a certain contract between the said plaintiffs and the said J. G. Peacock, whereby plaintiffs sold to the said J. G. P., and the said J. G. P. purchased of plaintiffs, the said 30 tuns of linseed oil at the price of £42 10s. per tun, usual allowances, to be delivered in the river Thames, 10 tuns the last fourteen days in March then next, 10 tuns the last fourteen days in April then next, 10 tuns the last fourteen days in May then next, and the amount of each parcel to be paid for from delivery in ready money, less $2\frac{1}{2}$ per cent. discount; which said contract the said plaintiffs and J. G. P. then respectively accepted; and whereas also, after the making of the said contract, plaintiffs, in pursuance thereof, consigned to defendant, at London aforesaid, in the last fourteen days of March and April respectively, two several parcels of linseed oil of 10 tuns each, to be delivered by him to the said J. G. P. upon the price of the amount thereof being paid by the said J. G. P. to defendant in ready money, less $2\frac{1}{2}$ per cent. discount, and defendant then delivered the same respectively to the said J. G. P. upon such payment thereof being so made; and whereas also, after the making the said contract, and in pursuance thereof, and of such retainer and employment as aforesaid, to wit, on &c., plaintiffs consigned to defendant, as such broker as aforesaid, at London aforesaid, by a certain barge or vessel called the "Barham," 10 other tuns of linseed oil, being the residue of the said 30 tuns comprised in the said contract, to be delivered by said defendant to the said J. G. P. upon payment of the price thereof by the said J. G. P. to defendant; and the said last mentioned 10 tuns of linseed oil, being so consigned, afterwards, to wit, on &c., arrived in London aforesaid on board of the said barge or vessel, of all which the defendant then had notice, and then took upon himself the delivery of the last mentioned 10 tuns of linseed oil according to the terms of the said contract; and thereupon it became and was the duty of the defendant, as such broker as aforesaid, to use all reasonable care and diligence that the said 10 tuns of linseed oil should not be delivered to the said J. G. P., or any other person, without the price thereof being paid to him, defendant, according to the terms of the said contract: Yet defendant, not regarding his said duty, but contriving and intending to defraud and injure plaintiffs, did not nor would use reasonable care and diligence that the said last mentioned 10 tuns of linseed oil should not be delivered to the said J. G. P., or any other person, without the price thereof being paid to defendant, but wholly neglected and refused so to do; and so negligently and carelessly behaved in the

premises, that, by and through the mere carelessness and negligence of defendant, the said last mentioned 10 tuns of linseed oil, after the arrival thereof at London aforesaid, to wit, on &c., were delivered to certain persons carrying on trade under the firm of Messrs. John Hare and Co., at Bristol, without the price for the same or any part thereof being paid by the said J. G. P., or any other person, to defendant; by reason whereof, and of the said J. G. P. having become a bankrupt, and being unable to pay for the said oil, plaintiffs have lost and been deprived of the said oil, and the price and value thereof; to the damage, &c.; and therefore, &c.

Pleas. 1. Not guilty. 2. That plaintiffs did not consign to defendant nor did defendant take upon himself the delivery of the said last mentioned 10 tuns of oil in manner, &c. 3. That plaintiffs had not retained or employed defendant as such broker as in the declaration mentioned to sell the said linseed oil in the said declaration mentioned, and to deliver the same for commission or reward to defendant in that behalf, nor did defendant accept such retainer and employment, in manner, &c. Issues thereon.

On the trial, before Lord Denman, C. J., at the Sittings in London after Hilary term, 1839,¹ the plaintiffs had a verdict. Sir J. Campbell, Attorney-General, in Easter term, 1839, obtained a rule to show cause why the judgment should not be arrested.

[After argument, the Court of Queen's Bench held, that the rule for arresting the judgment should be made absolute.]

The plaintiffs brought error in the Exchequer Chamber.

Cleasby, for plaintiffs in error.

Butt, *contra*.

[Arguments omitted.]

TINDAL, C. J. The judgment for the plaintiffs in the Court below (who are also the plaintiffs in error) having been arrested on the ground of the insufficiency of the declaration, the whole question before us turns on the form of the action brought, and on the declaration itself.

The defendant makes two objections to the plaintiff's right to recover in this action. First, that the action is brought for a nonfeasance only, not for a misfeasance, and on that account it should have been, as he contends, an action of contract, not an action of tort; and secondly, that the duty stated in the declaration does not arise from the facts therein alleged.

That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for

¹ The cause had been tried before, and a new trial granted. *Boorman v. Brown*, 9 A. & E. 487.

want of competent skill or proper care in the service they undertake to render ; actions against common carriers, against ship-owners on bills of lading, against bailees of different descriptions : and numerous other instances occur in which the action is brought in tort or contract, at the election of the plaintiff. And as to the objection that this election is only given where the plaintiff sues for a misfeasance and not for a non-feasance, it may be answered that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance ; as in the particular case now before us, where the contract stated in the declaration on the part of the broker is, in substance, to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his direct undertaking is as much a wrongful act done by him, that is, a misfeasance, as it is a nonfeasance, the distinction between the two being in that case very fine and scarcely perceptible. But further, the action of case upon tort very frequently occurs where there is a simple non-performance of the contract, as in the ordinary instance of case against ship-owners, simply for not safely and securely delivering goods according to their bill of lading ; and as in the case of *Coggs v. Bernard*, 2 Ld. Raym. 909, where an undertaking is stated in the declaration as the ground of action ; and to give no further instance, the case of *Marzetti v. Williams*, 1 B. & Ad. 415, where the decision that the plaintiff was entitled to nominal damages without proof of any actual damage, rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law.

The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon a tort.

As to the second objection, we cannot but think the duty, upon the breach of which this action is founded, arises by necessary inference from the terms of the contract between the plaintiffs and the defendant as set forth in the declaration. The defendant is there stated to have been retained by the plaintiffs as their broker to sell certain goods, and to deliver the same according to the terms of the contract to such person as should become the purchaser ; and the declaration then proceeds to allege that the defendant, as such broker, made a certain contract between the plaintiffs and one Peacock, whereby he sold to Peacock, and Peacock purchased of the plaintiffs, the oil therein mentioned, at certain times of delivery, the amount of each parcel to be paid for from delivery in ready money ; and coupling together the terms of the particular contract made by the defendant with the terms of the defendant's retainer by the plaintiffs, we think it amounts to an express contract on the part of the defendant to deliver what he sold on the payment of ready money only ; and that the duty of the broker arose from this express contract so stated in the declaration, and not

simply from his character of broker, which the Court of Queen's Bench appears to have considered to be the meaning of the declaration.

We therefore think the plaintiffs are entitled to the judgment of the Court in their favor.

Judgment reversed.

The judgment of the Exchequer Chamber was affirmed in the House of Lords; 11 Clark & Fennelly, 1.

COURTENAY v. EARLE.

1850. 10 *Common Bench*, 73.¹

THE first count of the declaration stated, that, before and at the time of the committing of the several grievances thereafter mentioned, the defendant and one Horatio Hammick carried on business in co-partnership under and by the name, style, and firm of Hammick & Earle; that, on the 22d of May, 1848, the plaintiff accepted and delivered to the said Hammick & Earle, at their request, a certain bill of exchange for £161 13s. drawn by the said Hammick & Earle upon the plaintiff, and payable to their order three months after the date thereof; that, before the said bill became due, to wit, on the 14th of August, 1848, the plaintiff accepted, and delivered to the said Hammick & Earle, at their request, who then took and received of and from the plaintiff, a certain other bill of exchange for the sum of £94 10s., drawn by the said Hammick & Earle upon the plaintiff, and payable to their order three months after date, for and on account of so much of the said sum of £161 13s., and which said last-mentioned bill was duly paid by the plaintiff when the same became due; that the plaintiff, to wit, on the day and in the year aforesaid, and before the said bill for £161 13s. became due, paid to the said Hammick & Earle, who then accepted and received of and from the plaintiff, a certain large sum of money, to wit, the sum of £45, for and on account of the residue of the said bill and sum of £161 13s.; and that thereupon it became and was the duty of the defendant to indemnify the plaintiff, and to provide for, pay, and discharge the said bill for £161 13s., to the extent and amount of the said two sums of £94 10s. and £45 respectively: Breach, that the defendant neglected to indemnify the plaintiff, and that, by reason thereof, an action was brought against the plaintiff by the holders of the bill for £161 13s., and he was compelled to pay the amount with costs.

The third count stated, that, before the said bill so accepted by the plaintiff for £94 10s. became due, to wit, on the 27th of October, 1848, the plaintiff, at the request of the defendant and of the said Hammick

¹ Arguments omitted.

& Earle, and for their accommodation, and without any valuable consideration other than thereafter next mentioned, accepted a certain other bill for the sum of £95 10s. 6d., payable to the order of the said Hammick & Earle, three months after date thereof; that in consideration of such acceptance, the defendant then undertook and agreed with the plaintiff to provide a certain sum, to wit, £50, in part payment of the said acceptance for the said sum of £94 10s., at the time when the same became due; nevertheless, the defendant, disregarding his duty in that behalf, did not nor would, nor did nor would the said Hammick & Earle, provide the said sum of £50, or any other sum or sums, in such part payment as aforesaid, but, on the contrary thereof, wholly neglected and refused so to do, although the plaintiff, on the faith of the said undertaking to provide the said sum of £50, delivered to the defendant the said acceptance for the said sum of £95 10s. 6d.: yet that the defendant did not nor would, nor did nor would the said Hammick & Earle, return or deliver up the said acceptance for the said sum of £95 10s. 6d., or provide for or pay the same when the same became due; whereby the plaintiff lost the said sum of £50, and was compelled to pay the said amount of the said bill for £95 10s. 6d., to wit, to one J. S., the holder thereof, who sued the plaintiff, &c.

The fourth count stated, that, at the time of the writing by the defendant, and receiving by the plaintiff, of the letter thereafter mentioned, and before and at the time of the committing of the grievances thereafter mentioned, to wit, on the 13th of February, 1849, the defendant and plaintiff had divers dealings and transactions together, and there were then outstanding in the hands of one J. S., who was then the holder thereof, two bills of exchange drawn by the defendant and Hammick, under the name, style, and firm of Hammick & Earle, upon, and accepted by the plaintiff, that is to say, a bill of the 22d of May, 1848, for £161 13s., payable to the order of Hammick & Earle three months after date, and also a bill of the 27th of October, 1848, for £95 10s. 6d., at three months; that thereupon the defendant, before the committing of the grievances thereafter mentioned, to wit, on the 13th of February, 1849, wrote and sent to the plaintiff a certain letter and proposal, in the words and figures following, that is to say, — “196 Piccadilly, Feb. 13, 1849. Dear Sir (meaning the plaintiff), — I (meaning thereby the defendant) called on you to-day, &c. My proposal is, that you shall give us a cheque for £41 12s. 4d., and two bills for the remaining £100, one at three, and the other at four months, or, if it should be inconvenient, your cheque can be dated a week hence. If you assent to this, I will engage to get you back the two bills J. S. now holds (meaning the said bills for £161 13s. and £95 10s. 6d.), or, failing that, to return you the two bills I contemplate drawing on you. Henry Earle.” That thereupon the plaintiff afterwards, and before the committing of the grievances, &c., to wit, on the 13th of March, 1849, wrote and delivered to the defendant a cheque for the sum of £24 8s. 4d. on Messrs. Hoare & Co., bankers, and then proposed to the defend-

ant to reduce the sum of £41 12s. 4d. in the said letter of the defendant mentioned, to the sum of £24 8s. 4d., and that the defendant should accept the said sum of £24 8s. 4d. instead of the proposed sum of £41 12s. 4d., and on the terms of the said letter of the defendant; that the plaintiff also sent and delivered to the defendant two bills of exchange for the remaining £100 in the said letter mentioned, according to the intent of the said letter, drawn by the defendant and Hammick under the name, style, and firm of Hammick & Earle, upon, and accepted by, the plaintiff for £50 3s. 6d., and £50 4s. 6d., at three and four months respectively, payable to the order of Hammick & Earle; that the defendant thereupon received the cheque and its amount from Messrs. Hoare & Co., and then consented to the said proposal, and accepted the said cheque and its proceeds instead of the said sum of £41 12s. 4d., and also accepted the said two bills for the remaining £100, upon the terms and conditions in the said letter and proposal of the defendant, and not otherwise; that it thereupon became and was the duty of the defendant to get back and return and deliver up to the plaintiff the two bills so held by the said J. S., or to return to the plaintiff the two bills which the defendant so contemplated drawing, and which were so in fact drawn on the plaintiff, and accepted by him and delivered to the defendant as aforesaid; yet that the defendant, disregarding his duty in that behalf, and although a reasonable time in that behalf had elapsed before the commencement of the suit, and though often requested by the plaintiff so to do, did not nor would get back for the plaintiff the two bills so held by J. S., or either of them; but wholly failed to get back the same, or return or deliver up the same, or either of them, to the plaintiff, and neglected to return to the plaintiff the said two bills, or either of them, which the defendant contemplated drawing, &c., to wit, the two bills for £50 3s. 6d. and £50 4s. 6d. respectively, and permitted the said bill for £95 10s. 6d. to remain outstanding in the hands of J. S., contrary to his duty in that behalf, and also permitted the said bill for £161 13s. to remain outstanding in the hands of P. L. as the holder thereof, and did not return any of the said bills to the plaintiff; whereby the plaintiff was compelled to pay the said two bills, together with costs, to the holders thereof.

The declaration also contained a count in trover.

To this declaration the defendant demurred generally.

Willes, in support of the demurrer.

Needham, contra.

JERVIS, C. J. I am of opinion that the defendant in this case is entitled to the judgment of the Court. If the case of *Boorman v. Brown*, 3 Q. B. 511, 11 Clark & Fin. 1, were an authority to the full extent to which it has been pressed by Mr. Needham, no doubt the third and fourth counts here might well be joined with counts in tort. But, upon examination, that case will be found to proceed upon this principle, — that, where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that

duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast. And, if that be so, the case is reconcilable with the other cases with which it has been supposed to conflict. Before that case, it had been supposed, upon the authority of *Corbett v. Packington*, that the violation of a bare promise, without any such general duty, might be the subject of an action of tort. That clearly is not so. Without altogether destroying the well-known distinction between actions of contract and actions of tort, I think we cannot hold the counts in this declaration to be well joined.

MAULE, J., and V. WILLIAMS, J., delivered concurring opinions. TALFOURD, J., concurred. *Judgment for defendant.*

LEGGE v. TUCKER.

1856. 1 *Hurlstone & Norman*, 500.

THE declaration in this case was as follows: For that the plaintiff, at the defendant's request, delivered to the defendant, then being a livery and cart stable-keeper, a certain horse of the plaintiff, to be by him taken due and proper care of, and to be kept in a separate stall in the defendant's stable, for reward to the defendant to be paid by the plaintiff in that behalf. And the defendant accepted the care and custody of the said horse upon the terms aforesaid: yet he would not, whilst he so had the care and custody of such horse upon the terms aforesaid, take due and proper or any care thereof, or keep it in a separate stall as aforesaid; and by means of the premises the same horse was so injured and kicked by other horses that the same horse of the plaintiff became and was of no use or value to the plaintiff, and the plaintiff was deprived of the use thereof and has been compelled to hire other horses, from time to time, to supply the place of the said horse. The defendant pleaded first, not guilty; secondly, a denial that the plaintiff delivered the horse to the defendant to be taken care of, &c., as alleged in the declaration. Issue having been joined on the pleas, the cause was tried before MARTIN, B., at the London Sittings after last Trinity Term, when a verdict was found for the plaintiff with £7 damages. No certificate was granted. The Master having taxed the plaintiff his full costs, the defendant took out a summons at Chambers calling on the plaintiff to show cause why the Master should not review his taxation; or why the *postea* and judgment thereon should not be amended by striking out so much thereof as relates to costs. The summons was heard before Crowder, J., who referred the matter to the Court.

Prentice having obtained a rule *nisi* in the terms of the summons, *Lush* showed cause. The question is, whether this declaration is in

assumpsit or case. By the County Court Act, 13 and 14 Vict. c. 61, s. 11, a plaintiff who recovers in a superior Court a sum not exceeding £20 in an action of "covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage," or a sum not exceeding £5 "in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction," shall have judgment to recover such sum only, and no costs. This is an action on the case. It is true that the cause of action originates in contract, but it is one for which the plaintiff might sue either in assumpsit or case, and he has adopted the latter form. [MARTIN, B. If a plaintiff declares in case, he must declare upon the general duty of every person to conduct himself with care.] In *Govett v. Radnidge*, 3 East, 62, the declaration stated that the defendants had the loading of a hogshead of the plaintiff for certain reward, and they so negligently conducted themselves in the loading, that by reason thereof the hogshead was let fall and damaged; and it was held that the gist of the action was the tort, and not the contract out of which it arose. [MARTIN, B. In *Bretherton v. Wood*, 3 B. & B. 54, which was an action against a stage-coach proprietor for injury to a passenger by upsetting the coach, it was held that the action was founded in tort. But in the case of carriers, the custom of the realm imposes on them a duty to carry safely, and a breach of that duty is a breach of the law, for which an action lies founded on the common law, and which does not require a contract to support it. So in the case of a farrier who shod a horse negligently, he might be sued in tort.] He also referred to *Powell v. Layton*, 2 N. R. 365.

Prentice appeared to support the rule, but was not called upon to argue.

POLLOCK, C. B. The rule must be absolute. Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of assumpsit; but where there is a duty *ultra* the contract, the plaintiff may declare in case.

ALDERSON, B. I am of the same opinion. The right of the plaintiff to sue at all depends on a contract, and consequently it is an action of contract.

MARTIN, B. I am of the same opinion.

WATSON, B. The action is clearly founded on contract. Formerly, in actions against carriers, the custom of the realm was set out in the declaration. Here a contract is stated by way of inducement, and the true question is, whether, if that were struck out, any ground of action would remain. *Williamson v. Allison*, 2 East, 452. There is no duty independently of the contract, and therefore it is an action of assumpsit.

Rule absolute.

TATTAN v. GREAT WESTERN RAILWAY CO.

1860. 2 *Ellis & Ellis*, 844.¹

DIGBY had obtained a rule, calling on the plaintiff to show cause why the Master's taxation of costs in this action should not be set aside, and the plaintiff's costs disallowed.

The action had been brought to recover the value of a bale of canvas, which had been consigned to the defendants at their station at Gloucester, to be carried to their station at Farringdon Road.

The declaration stated that the plaintiff sued the defendants, "For that the defendants were common carriers of goods for hire upon and along The Great Western Railway from Gloucester to Farringdon Road, and the plaintiff, at the request of the defendants, caused to be delivered to them as such carriers, and they accepted and received, certain goods, to wit, fifteen bales of canvas, of the plaintiff, to be taken care of and safely and securely carried and conveyed by the defendants, as such carriers, upon and along the said railway from Gloucester to Farringdon Road aforesaid; and there, within a reasonable time in that behalf, to be safely and securely delivered by the defendants to the plaintiff for reward to the defendants in that behalf: yet the defendants, not regarding their duty in that behalf, did not take care of the said goods, or safely or securely convey the same from Gloucester to Farringdon Road, nor there within a reasonable time, or at any time, safely or securely deliver the same to or for the plaintiff, although a reasonable time for such delivery had elapsed before the commencement of this action; but so carelessly and negligently conducted themselves with respect to the said goods, that, by reason of their negligence and carelessness, one bale of the said goods, containing canvas covers and rick cloths, became and was and is wholly lost to the plaintiff. And the plaintiff claims £50."

The defendants suffered judgment by default, and on a writ of inquiry a verdict was found for the plaintiff for £11 5s. the value of the bale of canvas lost.

The defendants took out a summons calling on the plaintiff to show cause why he should not be deprived of his costs by a suggestion on the roll or otherwise, and why, on payment of £11 5s., without costs, by the defendants, all further proceedings should not be stayed. The summons was heard by Blackburn, J., and the question was then raised before him whether the action was not an action of contract, within Stat. 19 & 20 Vict. c. 108, s. 30.² The learned judge referred the

¹ Arguments omitted. — ED.

² This statute enacts, that where an action of contract is brought in a Superior Court to recover a sum not exceeding £20, and the defendant in the action suffers judgment by default, the plaintiff shall recover no costs unless by order of the Court or a judge. — ED.

matter to the Court; and it was agreed, at his suggestion, that the plaintiff's costs should be taxed, subject to the present motion; which was accordingly done.

Macnamara showed cause.

Digby, contra.

COCKBURN, C. J. I am of opinion that this rule must be discharged. I own I regret that the law should remain in a somewhat anomalous position on this question; and that, as in this particular case, a party who has an option to sue either for a breach of contract or for a violation of duty, should get his costs or lose them according as he has framed his declaration in the one way or in the other. It would have been better if the Legislature had more clearly indicated their intention; but it is not our province to legislate for them. The statute deprives a plaintiff of costs, in the event of a judgment by default, where an action of contract is brought in a Superior Court to recover a sum not exceeding £20. The question therefore is, whether the present is an action of contract or on the case. Now, whatever may be the distinction between an obligation arising out of a contract and a duty imposed by the common law on persons entering into a contract, it is impossible to refer to the cases to which our attention has been called, without seeing that they establish that a duty was imposed upon the defendants in the present case, by the custom of the realm, so soon as they entered into the contract with the plaintiff, and independently of the terms of the contract itself. The plaintiff might, had he thought fit, have brought his action on the contract; but he was also entitled to sue the defendants for the breach of their common-law duty. Having chosen the latter course, he cannot, according to the authorities, be said to have brought an action of contract; although, therefore, he has recovered less than £20 by a judgment by default, he is not deprived of his costs by stat. 19 & 20 Vict. c. 108, s. 30. The action is an action on the case not in form only but in substance.

CROMPTON, J. I am of the same opinion. When enacting stat. 13 & 14 Vict. c. 61, s. 11, the Legislature appears to have thought that it was necessary to specify the different kinds of actions of contract and of tort respectively; "covenant, debt, detinue, or assumpsit" being mentioned on the one hand, and "trespass, trover, or case" on the other. That enactment contains an exception of the case of a judgment by default; an exception which is taken away, as regards actions of contract, by stat. 19 & 20 Vict. c. 108, s. 30; which however, curiously enough, leaves untouched the case of a judgment by default in actions of tort. It follows that a plaintiff who obtains judgment by default in an action on the case, though for the very smallest amount, is still entitled to his costs. It is said, for the defendants, that the present is substantially an action of contract and not on the case. But ever since *Pozzi v. Shipton*, 8 A. & E. 963, it has been settled law that an action against a common carrier, as such, is substantially an action of tort on the case, founded on his common-law duty to carry

safely independently of the particular contract which he makes. *Marshall v. York, Newcastle, and Berwick Railway Company*, 11 C. B. 655, is a recent decision to that effect. It is, therefore, impossible for us to say that the present is an action of contract within the meaning of stat. 19 & 20 Vict. c. 108, s. 30.

HILL, J. I am entirely of the same opinion. The Legislature seems designedly, in stat. 13 & 14 Vict. c. 61, s. 11, to have used more precise language than in stat. 9 & 10 Vict. c. 95, s. 129; giving in the later statute the well-known names of the different forms of action, "covenant, debt, detinue, or assumpsit," "trespass, trover, or case," instead of, as in the earlier, making general reference to an "action" "founded on contract" or "founded on tort." Is, then, the present an action on the case or an action of assumpsit? *Pozzi v. Shipton*, *supra*, and *Marshall v. York, Newcastle, and Berwick Railway Company*, 11 C. B. 655, are distinct authorities that it is the former, and therefore not an action of contract within stat. 19 & 20 Vict. c. 108, s. 30.

BLACKBURN, J. I am of the same opinion. [His Lordship read stats. 9 & 10 Vict. c. 95, s. 129; 13 & 14 Vict. c. 61, s. 11; and 19 & 20 Vict. c. 108, s. 30.] The question is, is this an action of contract or on the case? *Marshall v. York, Newcastle, and Berwick Railway Company*, *supra*, is a distinct decision that it is in substance, no less than in form, an action on the case. The defendants there were held liable to the plaintiff, a servant travelling on their line with his master, who paid his fare, for the loss of his luggage; although not only was the declaration not framed on a contract, but there was no contract with the plaintiff on which it could have been framed. That is a conclusive authority that a common carrier is liable to an action for a breach of the duty imposed on him by the custom of the realm, apart from any considerations of contract. The present is an action of that description, and not of contract.

Rule discharged.

PONTIFEX v. MIDLAND RAILWAY CO.

1877. *Law Reports*, 3 *Queen's Bench Division* 23.¹

COCKBURN, C. J. In this case there was a statement of claim by which the plaintiff claimed £12 16s. 6d. The defendant paid that sum into Court, and the plaintiff took it out in satisfaction.

The question is, whether the plaintiff is entitled to recover his costs. His right to them is regulated by 30 & 31 Vict. c. 142, s. 5, by which it is enacted that if the plaintiff in an action in the Superior Courts "shall recover a sum not exceeding £20, if the action is founded on

¹ Statement and arguments omitted. — Ed.

contract, or £10 if founded on tort ;" he shall not be entitled to any costs unless he has a certificate of the judge, or an order of the Court.

The amount recovered in this case being £12 16s. 6d., it follows that if the action is founded on tort the plaintiff is entitled to costs, if on contract, he is not so entitled. Formerly, when there were forms of action, there would have been little difficulty in determining whether an action was founded on contract or tort, but now that the claim is made by a narration of facts, it does not always clearly appear to which class, contract or tort, the case properly belongs. Effect, however, must be given to the distinction made by the Act of Parliament.

If there is an express contract, and the act complained of is a breach of it, the action is clearly founded on contract ; if there is no contract at all, but the act is an unauthorized intermeddling with property, it is clearly founded on tort ; but the difficulty arises in a case like the present, where there is undoubtedly an unauthorized intermeddling with property, but the act is connected with a contract originally entered into, and there is ground for regarding it as founded on that contract, or some new contract implied from the circumstances.

The facts of the present case are that the plaintiff had agreed to sell a quantity of composition pipe to H. Winfield & Co., and had delivered them to the defendants as carriers, consigned to the purchasers. This appears from the statement in paragraph 2 to be the ordinary case of delivery to a carrier for a purchaser, and when that is the case, unless other circumstances appear, it is regarded as a contract made on behalf of the consignee by the consignor as his agent. See what is said by the judges in *Cork Distilleries Co. v. Great Southern and Western Ry. Co. (Ireland)*, Law Rep. 7 H. L. 277, and by the Lord Chancellor, Id. 278.

It further appears by paragraph 3 that, Winfield & Co. becoming insolvent, the plaintiff stopped the goods *in transitu*. The effect of this was, no doubt, to put an end to the contract of carriage, and to revest the property in the plaintiff. The plaintiff afterwards gave notice to the defendants to hold the goods to his order, but the defendants notwithstanding delivered the same afterwards to Winfield (paragraph 3). Under these circumstances, it may no doubt be said that the claim of the plaintiff arose out of the original contract of carriage, and was in that way founded on contract. But it appears to us that the words, "founded on contract," mean directly founded on contract, and not remotely, as in the present case. In reality, what the defendants did was to perform the original contract of carrying, which they had no right to do after the stopping *in transitu*. The contract was put a stop to by an unusual and unexpected event, the stopping *in transitu*, and the question really becomes whether that event placed the plaintiff and the defendants in the relation of parties contracting with each other, or in the relation which exists where one person is, without any intention to be so, in the possession of the property of another.

In the present case the plaintiff gave notice to the defendants to

hold the goods to his order. If they had agreed to do so there would have been a contract; but they refuse to do so, and deliver the goods to the purchaser. It appears to us that the claim of the plaintiff is not founded on any existing contract between him and the defendants, but on the wrongful act of the defendants in delivering the goods as they did. The contract of the defendants was to carry and deliver. But under the circumstances which arose, the law gave the plaintiff the right to put an end to that contract and to demand back the possession of the goods, and he did so. From that time the retention of the goods, and the dealing with them by the defendants, became tortious.

And this agrees with the view which was always taken of such a case when the action of trover existed. For such a misdelivery after notice was always treated as a wrongful conversion. The statute in using the words "founded on tort" may be fairly regarded as having reference to such cases as were at the time always treated as cases of tort.

Order absolute.

BRYANT v. HERBERT.

1878. *Law Reports, 3 Common Pleas Division*, 389.¹

In the Court of Appeal.

Action claiming the return of a picture, or its value, and damages for its detention.

The cause was tried before Denman, J., at the last Michaelmasittings at Westminster. It appeared that the plaintiffs, who are picture-dealers, had bought a painting which purported to be by the defendant, a Royal Academician of repute; that, on the 30th of December, 1876, one of the plaintiffs took it to the defendant's house for the purpose of ascertaining whether or not it was genuine, and left it with him for examination, taking a receipt for it; that the defendant, finding the picture to be spurious, refused to restore it to the plaintiffs except upon the condition of their acknowledging it to be a forgery and "consenting to erase his name from it; and that, the plaintiffs declining to accede to these conditions, the defendant detained the picture.

The jury assessed the value of the picture at £10, and the damages for its detention at 1s. The learned judge refused to order the picture to be delivered up to the plaintiffs, and directed a verdict to be entered for them for £10 1s., and made no order as to costs.

The master declined to tax the plaintiffs' costs, on the ground that, the action being founded on contract, and not on tort, the plaintiffs were, under s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), disentitled to costs, not having recovered a sum exceeding £20.²

¹ The statement is from the report of the case in the Court below. — ED.

² 30 & 31 Vict. c. 142, s. 5: "If in any action commenced after the passing of this Act in any of her Majesty's superior Courts of record, the plaintiff shall recover a sum

Application was then made to Field, J., at chambers, and he likewise refused to order a taxation. The plaintiffs appealed to the Court.

Denman and Lindley, JJ., refused to grant plaintiffs' application for costs.

Plaintiff then appealed to the Court of Appeal.

Finlay (Day, Q. C., with him), for plaintiff.

H. Matthews, Q. C., and *Bagnall Wild*, for the defendant.

Cur. adv. vult.

BRAMWELL, L. J. It seems to me that the question in this case is, what is the meaning of the words "in any action founded on contract," and "on any action founded on tort." Before discussing that, it should be noticed that the statute applies, whether the case is decided by verdict, demurrer, or other means. It seems, therefore, inasmuch as no facts are known when the decision is on demurrer, except those stated on the pleadings, that "founded on contract," or "founded on tort," must mean so founded on the face of the pleadings. If so, there seems to me less difficulty than if the facts of the case are to be considered. But either way what is the meaning of "founded on contract," and "founded on tort"? The words are not words of art even as much as *ex contractu* or *ex delicto* would be. They are plain English words, and are to have the meaning ordinary Englishmen would give them. What is the foundation of an action? Those facts which it is necessary to state and prove to maintain it, and no others. This really seems a truism; unless those necessary facts exist, the action is unfounded. All other facts are no part of the foundation. There is a further observation. This statute passed after the Common Law Procedure Acts. They did not abolish forms of action in words. The Common Law Commissioners recommended that; but it was supposed that, if adopted, the law would be shaken to its foundations; so that all that could be done was to provide as far as possible that, though forms of actions remained, there never should be a question what was the form. This was accomplished save as to this very question of costs in actions within the County Court jurisdiction. Until the passing of the statute we are discussing, it was necessary to see if an action was *assumpsit*, *case*, &c. But the Common Law Procedure Act having passed, and forms of actions being practically abolished, the legislature pass this Act dropping the words "*assumpsit*, *case*," &c., and using the words "founded on contract," "founded on tort." This shows to me that the substance of the matter was to be looked at. One may observe there is no middle term; the statute supposes all actions are founded either on

not exceeding £20 if the action is founded on contract, or £10 if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certifies on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

contract or on tort. . So that it is tort if not contract, contract if not tort. Then is this action on the face of the statements of claim and defence founded on contract or on tort? All that is alleged is that the plaintiffs are owners of the picture, and that the defendant detains it. This means wrongfully detains it, not merely has in his possession, and negatively does not give it up. Then the action is manifestly founded on a tort on the pleadings. But so it is if the facts are looked at. I doubt if there was any contract between the parties. It is said that the defendant agreed to give up the picture. I think not. He was to let the owner take it away; but that is an obligation the law casts on every one who has another's property in his possession. But assuming there was some agreement, the action is not founded on it. Mr. Matthews was driven to contend that it was, and that the property was still in the plaintiffs, who could come and seize it, or maintain another action for it. This is impossible, and shows therefore that the action was for the tortious detention of the picture, and that the action was founded on the tort to the right of property, and not on any contract. Suppose the plaintiffs had sold the picture to A. B., he might have maintained this action. On what would it then have founded? Clearly not on contract; therefore on tort. So it is now. These are the considerations on which I think this case ought to be decided, and not by inquiries whether *detinue* is an action *ex contractu* or *ex delicto*. I think that the legislature intended that the substance of the action, and not its form, should be looked at. It leaves out what was in the former Act, "assumpsit, case," &c., and uses the general words, "founded on contract," "founded on tort." But if the old learning as it was called is to be brought to help us, I should come to the same conclusion. No doubt *dicta* and decisions are to be found that *detinue* is an action *ex contractu* or *ex quasi contractu*, &c.; but there are *dicta* and decisions the other way. It is not easy to make sense of them; perhaps the nature of the thing does not admit of it. It cannot be settled by saying that debt and *detinue* could be joined, and that actions of tort could not be joined with actions on contract. Actions on contract could not be joined, — *e. g.* debt and assumpsit. The reason being unconnected with the question whether the action was *ex contractu* or *ex delicto*. The last case I know of is *Clements v. Flight*, 16 M. & W. 42. This clearly holds that the action is founded on a tortious detention. I should therefore come to the same conclusion, if these considerations governed the case. But I believe that it was intended that all this useless, and worse than useless, learning should be disregarded, and the matter decided on its substance.

BRETT, L. J. I concur in the judgment of my learned brother, but I cannot agree with the reasons given. The question is what is the meaning of the words "founded on contract and founded on tort" in s. 5 of 30 & 31 Vict. c. 142. With the greatest deference to my Brother Bramwell, I cannot conceive that those words are what he calls plain English, because they seem to me to be technical terms. The conclu-

sion to which I have come is this, that the action of detinue is technically an action founded on contract. The action was invented to avoid the technicalities of the old law; the invention was to state a contract which could not be traversed. Therefore I think the action of detinue, or the form of the action of detinue, so far as the remedy is concerned in its legal signification, was founded on contract.

But, then, did the statute which we have to construe mean to use these terms in that sense? I have had great doubts whether it did not, and whether using the terms "founded on contract," or "founded on tort," it was not having regard to the form of action. But I am not prepared to disagree with the conclusion that the statute meant to deal not with the form of action, but with the facts with reference to which the form of action is to be applied. Now, if that be so, the question then is, whether the cause of action in fact here is a cause of action founded on contract in the sense of its being a breach of contract, or whether it is founded on tort in the sense of its being founded on a wrongful act. I certainly have come to a very clear conclusion that where persons are sued in detinue for holding goods to which another person is entitled, the real cause of action in fact is a wrongful act, and not a breach of contract, because it may arise and occur when there is no contract, and the remedy sought is not a remedy which arises upon a breach of contract. The real substantial cause of action is a wrongful act, and I am not prepared to say that the statute did not mean when it used the words "founded on contract," or "founded on tort," founded on breach of contract as distinguished from founded on a wrongful act. If so the action is founded on a wrongful act, and therefore within the meaning of the statute is founded on tort.

My Brother BAGGALLAY agrees in the result at which we have arrived.

Judgment reversed.

FLEMING ET AL. v. MANCHESTER, &C. R. CO.

[IN THE COURT OF APPEAL.]

1878. *Law Reports*, 4 *Queen's Bench Division*, 81.

THE following were the material portions of the statement of claim:—

1. The plaintiffs are wholesale hardware merchants, carrying on business in Dundee, in Scotland; and on the 26th of May, 1876, the plaintiffs by their agents, D. Miller & Son, of Sheffield, caused to be delivered to the defendants, as common carriers of goods for hire, a parcel of goods of the plaintiffs, to be carried by the defendants from Sheffield to Dundee for reward to the defendants.

2. The defendants, as such common carriers as aforesaid, accepted the said parcel of goods, to be by them taken care of and safely and securely carried and delivered to the plaintiffs at Dundee.

3. The defendants did not take care of, and safely and securely carry and deliver to the plaintiffs the said parcel of goods, but not regarding their duty in that behalf, so carelessly and negligently conducted themselves with respect thereto that the said parcel of goods was and is wholly lost.

The defendants paid into Court the sum of £12 3s. 4d., and gave notice thereof to the plaintiffs in the terms of Rules of the Supreme Court, Appendix B., Form 5, and the plaintiffs accepted the same in satisfaction of their claim, and gave notice thereof to the defendants in the terms of Form 6. Upon an application to a master to tax the costs of the plaintiffs, he refused to do so, on the ground that the action was "founded on contract" within the meaning of the County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 5).¹ Upon appeal to Lopes, J., at chambers, the decision of the master was affirmed. Upon appeal to the Queen's Bench Division the judges (Cockburn, C. J., and Mellor, J.) held that they were bound by the decision in *Tattan v. Great Western Ry. Co.*, 2 E. & E. 844; 29 L. J. (Q. B.) 184, and ordered that the defendants should pay to the plaintiffs the costs of the action.

The defendants appealed.

June 26. *Wilberforce*, for the defendants. This is an action "founded on contract," and therefore the plaintiffs are not entitled to costs. The plaintiffs may rely upon *Tattan v. Great Western Ry. Co.*, *supra*, but that case can hardly be considered a binding decision since *Baylis v. Lintott*, Law Rep. 8 C. P. 345. The plaintiffs' ground of complaint is the breach of the contract to carry, and therefore the case is clearly distinguishable from *Pontifex v. Midland Ry. Co.*, 3 Q. B. D. 23.

Maurice Powell (*H. D. Greene* with him), for the plaintiffs. The statement of claim in effect charges a breach of duty, and therefore the action is plainly for a tort. *Bretherton v. Wood*, 3 B. & B. 54; *Pozzi v. Shipton*, 8 A. & E. 963; *Marshall v. York, Newcastle and Berwick Ry. Co.*, 11 C. B. 655; 21 L. J. (C. P.) 34. Wherever goods are lost by a person who is bound to take care of them, he may be sued in tort. *Martin v. Great Indian Peninsular Ry. Co.*, Law Rep. 3 Ex. 9.

Wilberforce, in reply.

Cur. adv. vult.

¹ By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, "If in any action commenced after the passing of this Act in any of her Majesty's superior Courts of record the plaintiff shall recover a sum not exceeding £20, if the action is founded on contract, or £10 if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 67, "The provisions contained in the 5th . . . section of the County Courts Act, 1867, shall apply to all actions commenced or pending in the said High Court of Justice, in which any relief is sought which can be given in a county court."

Dec. 18. The judgment of the Court (BRAMWELL, BAGGALLAY, and THESIGER, L. JJ.) was delivered by—

BRAMWELL, L. J. This case was argued before this Court during Trinity Sittings, and we then took time to consider the question raised between the parties, and we have now come to the conclusion that the decision of the Court below must be reversed; we do not differ from a clear opinion of the judges of the Queen's Bench Division, for if they had not felt themselves bound by the decision in *Tattan v. Great Western Ry. Co.*, *supra*, they might have decided in favor of the defendants. The question is, whether the plaintiffs are entitled to costs in an action in which they have recovered a sum not exceeding £20, and in which they charged the defendants as common carriers. According to *Bryant v. Herbert*, 3 C. P. D. 389, we have to determine whether the action is "founded on contract" or "on tort," and whether we are to decide this question by looking at the form of the pleadings or at the facts, it is clear that this action is "founded on contract." By paying money into Court unconditionally, the defendants have admitted the truth of the allegations set forth in the statement of claim. These allegations seem in effect to amount to a charge, that, in consideration of the payment of hire, the defendants promised to carry safely the plaintiffs' goods; and this would clearly have been under the old forms of pleading a declaration in contract. It is unnecessary for us to determine whether *Tattan v. Great Western Ry. Co.* was rightly decided; for it came before the Court of Queen's Bench before the passing of the County Courts Act (30 & 31 Vict. c. 142), s. 5; but we may say that we are not satisfied with the decision in that case. The question before us depends upon the statute which I have just mentioned. *Pontifex v. Midland Ry. Co.*, *supra*, may appear at first sight in favor of the plaintiffs; but upon examination of the facts it will be found that we are not really differing from that decision. The plaintiff in that case had delivered goods to the defendants to be sent to certain persons; afterwards the plaintiff discovered that the consignees were insolvent, and he, as unpaid vendor, elected to exercise his right of stoppage *in transitu*; he thereupon gave notice to the defendants to re-deliver the goods to him, but they delivered them to the consignees whereby the goods became lost to the plaintiff; he had put an end to the original contract to carry and deliver, and the delivery by the defendants to the consignees was a wrongful conversion and therefore a tort; the goods came into the hands of the defendants under a contract; but after that contract had been determined, the defendants wrongfully dealt with them. It is manifest that *Pontifex v. Midland Ry. Co.* is very distinguishable from the present case. Here the real ground of complaint was the breach of the contract to deliver. The decision of the Queen's Bench Division must be reversed.

Appeal allowed.

COHEN v. FOSTER.

1892. 66 *Law Times, New Series*, 616.

THIS was an appeal from an order of Pollock, B., in chambers, affirming an order of the master, by which the costs in the action were ordered to be taxed on the County Court scale.

The action was brought to recover "damages for wrongfully detaining from the plaintiff an hydraulic press." The defendants were auctioneers, and the press was purchased from them at an auction. One of the conditions of sale was, that the press should be paid for in seven days. The defendant, alleging default of such payment on the plaintiff's part, resold the machine to a person other than the plaintiff, and in their defence they justified their so reselling it on the ground that the property in the article had not passed to the plaintiff. The plaintiff, in reply, set up a waiver of the condition as to payment within seven days, and at the trial he put in a correspondence which he alleged extended the time of payment from the 26th November, the date of the contract, to the 2d February, and he proved that on the 2d February he tendered the purchase-money to the defendant. The learned judge (Charles, J.) at the trial found the question of waiver in favor of the plaintiff, and gave him judgment for £29 and costs to be taxed.

Before the extended time had run out the plaintiff had agreed to sell the press for £50, the original purchase-money having been £10 10s., but if the delivery could have taken place the plaintiff would have been put to considerable expense in getting out and moving the press, which being taken into account, reduced the damages to £29, the sum awarded to him by the learned judge.

On the 23rd March the costs were ordered by Master Johnson to be taxed on the County Court scale, on the ground that this was an action founded on contract, within sect. 116 of the County Courts Act 1888, and on appeal to Pollock, B., on the 5th April, that decision was affirmed. The plaintiff now appealed, against those decisions of the master and the learned baron, to the Divisional Court.

A. J. Walter, for the appellant. This was an action founded on tort. If the press had not been resold no doubt the action would have been on the contract, but the reselling of it by the defendant was tortious, and was the basis of the present action. The verdict at the trial shows that the defendant was not entitled to sell. It was not a mere failure to deliver, but a conversion, and nothing else. True, there was a contract out of which these proceedings arose, but the action was only remotely founded on the contract, and was directly founded on the tort. *Martindale v. Smith*, 1 Q. B. 389; 10 L. J. N. S. 155 Q. B., is on all-fours with the present case, which is framed in the same way and governed by the same principles as *Pontifex v. The Midland Railway Company*, 37 L. T. Rep. N. S. 403; 3 Q. B. Div. 23. The form used

for the statement of claim in this case is that provided by the rules for an action of trover.

Gaskell, for the respondent. This was an action founded on contract. The true principle is laid down in *Bryant and another v. Herbert* (in the Court of Appeal), 39 L. T. Rep. n. s. 17; 3 C. P. Div. 189. The action was founded on the original contract as varied by the waiver, and the question is, not whether out of these facts a tort can be found, but whether, looking at the way the plaintiff framed his case, it was founded on contract. In *Fleming v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 39 L. T. Rep. n. s. 555; 4 Q. B. Div. 81, it was possible to get an action of tort out of the facts; but the duty was held to arise out of contract, as it does in the present case. In *Pontifex v. The Midland Railway Company*, *ubi supra*, the contract had been put an end to before the tort arose. The ground of action here is the breach of contract to deliver, and the resale to a person other than the plaintiff is immaterial.

MATHEW, J. This appeal must be allowed. There is no doubt that the action was fought at the trial as an action of tort. It is agreed that the property passed when the plaintiff tendered the purchase-money, and the defendant resold an article the property in which had passed away from him. If the defendant is right, and it was an action of contract claiming damages for non-delivery, the question of property would remain, and the plaintiff would be in a position to go to the purchaser and say, "Give up the press, for it is mine." This is sufficient to dispose of the case. Suppose the action had been against the purchaser, the same facts would have been given in evidence, and it would have been impossible to say that the action was other than one of tort. Again, the measure of damages would not necessarily be what was received here, if the action was one of contract. The question is an extremely technical one, but it is one of substance, and not of mere form, and justice will best be done by treating the action as it was treated at the trial, as an action of tort.

COLLINS, J. It is clear that this is an action of tort. The goods were sold, and the property passed to the plaintiff, but the defendant had a lien and a right to sell if the plaintiff made default. The question whether the plaintiff had made default was the point in issue at the trial, and it was decided in the plaintiff's favor. The defendant sold the plaintiff's goods asserting a right inconsistent with the plaintiff's claim, and that was a clear act of conversion. It is said that the action arose out of contract; at some stage or the other in such a case there must be a contract, but the subject of this action is a tort arising after the contract. The thing complained of is a conversion, and it was unquestionably so treated at the trial, and the pleadings were framed on that view, stating facts about the resale which would have been immaterial in an action on contract.

Plaintiff's appeal allowed.

MONROE v. WHIPPLE.

1885. 56 *Michigan*, 516.

TROVER. Plaintiff brings error. Reversed.

A. G. Day, for appellant. A contract or bond between parties does not preclude suit for a tort connected with the matters between them: *In Re Mowry*, 12 Wis. 52; *Cotton v. Sharpstein*, 14 Wis. 226; *Scheunert v. Kaehler*, 23 Wis. 527; *Suydam v. Smith*, 7 Hill, 182; *McDuffie v. Beddoe*, 7 Hill, 578; Addison on Torts, § 27; *Smith v. Frost*, 70 N. Y. 65; *Donohue v. Henry*, 4 E. D. Smith, 162; *Reeside v. Reeside*, 49 Penn. St. 322; a municipality has a general ownership in its public moneys: *Cairns v. O'Bleness*, 40 Wis. 469; *Montville v. Haughton*, 7 Conn. 543; and the general owner may sue in trover for a conversion, and a judgment obtained by the general owner is a bar to an action by the special owner. *Smith v. James*, 7 Cow. 328.

George Luton, for appellee.

COOLEY, C. J. The plaintiff township in this suit claims of the defendant moneys which he received as its treasurer, and has refused to pay over on demand at the expiration of his term of office. The declaration is in trover; and when the case was called for trial, the defendant objected that no recovery could be had in trover; and the Circuit Court so held, and gave judgment for defendant. This ruling presents the only question for decision.

It is insisted on the part of defendant that the relation between the defendant and the township for which he was treasurer was that of debtor and creditor merely; and that a creditor, on the basis of the mere indebtedness, is not entitled to proceed in tort for the collection of the demand. There is no question but the relation is such as is supposed. This, however, does not fully determine the question; for there are many cases in which a creditor may sue in tort if, in addition to the indebtedness, an element of wrong appears in the case to warrant it.

In this case, if the facts are as claimed by the plaintiff, there is not only a wrong in the defendant failing to pay over the moneys on demand, but it is a criminal wrong. Moreover, the wrong consists in a conversion by the defendant of the moneys which he fails to pay over; so that the facts essential to a recovery in trover are supposed to appear in the case with an additional element of criminal intent. *People v. McKinney*, 10 Mich. 54; *People v. Bringard*, 39 Mich. 24. The officer is supposed to have the money belonging to the township at all times in his hands ready to be paid out or paid over as required by law, and any amount which he refuses to pay over on proper demand he is supposed then and there to convert to his own use. This is the theory of the relation which public treasurers hold to their principals in this State; not for the purposes of criminal law alone, but for all purposes.

The Court was therefore in error in its ruling, and there must be a new trial.

The other Justices concurred.

RICH, APPELLANT, v. NEW YORK CENTRAL & HUDSON
RIVER R. Co., RESPONDENT.

1882. 87 *New York*, 382.¹

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1879, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

The complaint, in this action, alleged in substance that, about the year 1850, plaintiff, with others who were the owners of certain lands in the village of Yonkers, entered into an agreement with the Hudson River railroad to the effect that they would convey to said corporation a site for its depot, would fill in the same, and would lay out and grade their lands so as to give convenient communication between the depot and the business portion of said village, the said company agreeing to pay the actual cost of filling in the depot site, and to erect and ever after maintain its depot thereon. That said agreement was carried out, the site conveyed and the depot erected; that defendant succeeded to the rights, franchises, and obligations of said Hudson River Railroad Company, and plaintiff acquired the titles of the other owners of said remaining lands; that there was a navigable inlet crossed by said railroad which, together with the stream discharging into it, was known as the Nepperhan or Saw-mill river; that said Hudson River Railroad Company, having no right to cut off or obstruct the navigation in said inlet, had constructed and maintained a draw-bridge over it. That it subsequently procured the passage of an act of the legislature, authorizing it to bridge said inlet without any opening or draw, on making compensation to the riparian owners. That defendant, to avoid the payment of damages to said owners, "resolved to accomplish the same object by artifice and strategy;" and so threatened said riparian owners that unless they would surrender their rights, and consent to the construction of such bridge, it would remove its depot, and, upon said owners refusing so to do, did remove its depot to a point above a third of a mile north; that plaintiff, a short time previous to the threatened removal, had borrowed, on his bond secured by mortgage on his said lands, the sum of \$35,000, most of which was expended in erecting stores on his said lands, directly opposite and about one hundred feet south of said depot; and if the depot had not been removed, could have rented said stores and the adjacent lots for \$5,000 per annum, and could have sold other lots for sufficient to pay off said mortgage, but that in consequence of such removal his premises became wholly unproductive and unsalable; that, in order to have the depot restored to its original site and to save his property from being sacrificed, he was induced and coerced into giving his consent to the closing of said draw-

¹ Arguments omitted.—Ed.

bridge, and an agreement was entered into on March 7, 1877, in and by which defendant, in consideration of such consent, agreed that it would, "as soon as practicable, and within a reasonable time, build and forever thereafter maintain its principal passenger depot for Yonkers" upon said original site. That defendant thereupon removed the draw-bridge and erected a permanent bridge over the inlet. That it also erected a new depot on the old site; and had the same ready for use about April 15, 1878, but absolutely refused to open or establish its depot there unless the common council of Yonkers would pass an ordinance declaring and ordering the closing of a portion of a street which crossed its tracks, so that it could build a fence inclosing said tracks which would so exclude the plaintiff and others from the right and privilege of crossing said tracks to the steamboat docks on the Hudson river. That defendant procured the passage of an act of the legislature amending the charter of Yonkers so as to provide for the assessment and payment of damages claimed by the owners of land injuriously affected by the closing of a street. That the closing of said street would have damaged plaintiff's property to; at least, the sum of \$50,000, and would have neutralized, in great measure, all the benefits derived from the restoration of the depot; that plaintiff and others sent in remonstrances to the common council against such discontinuance, and it refused to pass an ordinance to that effect, because of the large amount of damages the city would have to pay; that upon such refusal being made known, defendant's officers publicly asserted that it would never open said new depot until said ordinance was passed, and would tear down the new depot, or use it exclusively for freight. "In all of which the defendant was actuated by malice and vindictiveness toward plaintiff, and a design to crush, ruin, and destroy him;" that in consequence of the removal of the depot and the consequent unproductiveness of plaintiff's property, he was unable to pay the interest on said bond and mortgage. Foreclosure was commenced, and a decree of foreclosure and sale was made; but that the mortgagee had forbore selling to give to plaintiff the benefit of the re-establishment of the depot; that defendant's officers and agents, after the refusal of the common council to pass the said ordinance, called upon the mortgagee and induced it "to withdraw the grace and favor" accorded to plaintiff, and to advertise the property immediately for sale, so as to cut off plaintiff's claim for damages, the mortgagee having been induced to waive any such claim; that the "scheme or plan which had been so concocted and arranged by and in the interest and for the special benefit and advantage of the defendant, to enable it to evade and violate with impunity its aforesaid covenant and obligation with the plaintiff . . . and to escape the payment of its fair and just proportion of the plaintiff's damages on the closing of said street, was fully carried out and executed by the instigation and connivance of the defendant;" that plaintiff's entire property was sold under said decree, and bid off by the mortgagee for \$20,000, and thereupon the ordinance

was passed closing said street, and defendant immediately opened the new depot. The complaint closes thus: "That the defendant, by means of the wrongs, injuries, and grievances aforesaid, and its malicious and unlawful actions in doing as aforesaid, has inflicted pecuniary loss and damage upon the plaintiff to the amount of \$150,000," for which sum judgment was asked.

Upon the trial, plaintiff offered in evidence the agreement of 1877, which was objected to and excluded as irrelevant and incompetent. Plaintiff also offered to show the alleged breach of that contract, the value of the property conveyed to defendant, and the establishment of the depot originally thereon; that defendant caused and procured the sale of plaintiff's property under the foreclosure decree, to deprive him of his claim for damages for closing the street; that it was sold for less than one-fifth of its value; that plaintiff was dispossessed at the instigation of defendant, and that if the depot had been re-established the market value of the property would have been largely increased. Plaintiff also offered to prove an interview with defendant's officers in reference to the removal and re-establishment of the depot, and the reasons they assigned for the removal and refusal to restore it, and also the amount of damage sustained by plaintiff in consequence of defendant's omission and refusal to re-establish the depot under the agreement of 1877, all of which was objected to and excluded on the same ground.

Defendant moved for a dismissal of the complaint on the following grounds:—

"*First*—Because the plaintiff has not laid the foundation, by any of the several agreements in evidence, to sustain a cause of action for damages arising from any wrongful act of the defendant in respect to the property of the plaintiff.

"*Second*—Because the gist of this action is the malicious and unlawful acts of the defendant in pursuing a scheme or plan to injure the plaintiff by depriving him of his property, based upon an alleged malicious violation of certain alleged contracts. The proof offered fails to make out any cause of action as set forth in the complaint, and would not sustain any verdict against the defendant for any damages in this action.

"*Third*—Because the complaint sets forth but a single cause of action, and the plaintiff cannot legally found a claim for damages upon the alleged breach of any one of the several agreements or contracts referred to."

The motion was granted.

R. W. Van Pelt, for appellant.

William Allen Butler, for respondent.

FINCH, J. We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult. Moak's

Underhill on Torts, 23. The text-writers either avoid a definition entirely (Addison on Torts), or frame one plainly imperfect (2 Bouvier's Law Dict. 600), or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes. Cooley on Torts, 3, note 1; Moak's Underhill, 4; 1 Hilliard on Torts, 1. By these last authors a tort is described in general as "a wrong independent of contract." And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with a contract (2 Bouvier [*supra*]), and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*. Cooley on Torts, 90. In such cases the tort is dependent upon, while at the same time independent of the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. 1 Addison on Torts, 13.

Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test.

In the present case, the learned counsel for the respondent seems to free himself from the difficulty by practically denying the existence of any relation between the parties, except that constituted by the contract itself, and then insisting that such relation was not of a character to originate any separate and distinct legal duty, argues that, therefore, the bare violation of the contract obligation created merely a breach of contract, and not a tort. He says that the several instruments put in evidence showed that there never had been any relation between the plaintiff and the railroad company, *except* that of parties contracting in reference to certain specific subjects, by plain and distinct agreements, for any breach of which the parties respectively would have a remedy, but none of which created any such rights as to lay the foundation for a charge of wilful misconduct or any other tortious act. Upon this theory the case was tried. Every offer to prove the contracts, and especially their breach, was resisted upon the ground that the complaint, through all its long history of plaintiff's grievances, alleged but a single cause of action and that for a tort, and, therefore, something else, above and beyond and outside of a mere breach of contract, must be shown, and proof of such breach was immaterial. From every direction in which the plaintiff approached the allegations of his complaint,

the same barrier obstructed his path and excluded his proof. Whatever may be true of the earlier agreements between the plaintiff and the railroad company, and conceding, what seems probable, that the evidence relating to them was properly rejected, on the ground that they left the defendant entirely at liberty to change the site of its depot, so that such change was in no respect either unlawful or wrong; there was yet a later agreement by the terms of which the defendant was bound, as soon as practicable and within a reasonable time, to restore the depot to its old location. The complaint explains the importance of such restoration to the plaintiff. It alleges that valuable property of his, heavily mortgaged, had depreciated in value in consequence of the removal of the depot, and could only be restored to something like its old value, and saved from the sacrifice of a foreclosure in a time of depression, by the prompt return of the depot to its former site. The complaint further avers, that to secure this result, the plaintiff had surrendered valuable riparian rights to the defendant, but the latter, fully understanding the situation, maliciously and wilfully broke its agreement, and delayed a restoration of the depot for the express purpose of preventing plaintiff from being enabled to ward off a foreclosure of the mortgage, and itself instigated such foreclosure and caused the ultimate sacrifice. For the breach of this contract to restore the depot within a reasonable time, the plaintiff had a cause of action. But that was not the one with which he came into Court. His complaint was for a single cause of action, and that for a tort; and what that alleged tort was, it is quite necessary to know, and in what respect, and how it differs from a mere breach of contract, in order to determine whether the rejected proofs were admissible or not.

That a good cause of action, sounding in tort, was stated in the complaint was not denied upon the trial. Neither by demurrer nor by motion was the sufficiency of the complaint in any manner assailed. The second ground upon which a nonsuit was asked practically confessed that there was a good cause of action but merely a failure to prove it. The ground stated was, "Because the gist of this action is the malicious and unlawful acts of the defendant in pursuing a scheme or plan to injure the plaintiff by depriving him of his property, based upon an alleged malicious violation of certain alleged contracts; but the proof offered fails to make out any cause of action as set forth in the complaint." The opinion of the General Term distinctly concedes the point, saying that the facts alleged made out "a clear case of fraud." And on the present appeal the learned counsel for the respondent explicitly admits, in his brief, that it was competent for the plaintiff, under the issue of fact joined by the pleadings, to give evidence of any of the alleged wrongful acts charged in the complaint, as a basis for the claim of damages which he asserted. There was, therefore, something to try; something which was susceptible of proof; a tortious act or omission, or a series of such acts or omissions, properly alleged in the complaint and open to the plaintiff's evidence. Why he was not per-

mitted to have a single one of the forty questions put to his witnesses answered becomes, now, the important inquiry. It will not be necessary to consider them all, for many were excluded for a defect in their form, or because totally immaterial, or in the exercise of the proper discretion as to the order of proof, but enough remain, and may be grouped together, to raise the serious question argued at the bar.

The plaintiff offered to show the agreement of March, 1877, between himself and the railroad company, for the restoration of the depot to its original site within a reasonable time, and the breach of that agreement by the defendant company. The objection, put upon the ground that the offered proof was irrelevant and incompetent, was sustained and the evidence excluded. The plaintiff then sought to show how long a time elapsed, after the execution of the contract, before the depot was re-established at the foot of Main street; whether an interval did occur, and how much time elapsed from the date of the contract to the building of the new depot, which evidence was also excluded as immaterial. A series of questions were further put, to show what the defendant did, if anything, in and about procuring plaintiff's mortgaged property to be sold and sacrificed under the mortgage; when the foreclosure took place; at whose instigation; and at what price, compared with its real value, the property was sold. These questions were excluded. The plaintiff also attempted to show that the re-establishment of the depot at the foot of Main street would have largely increased the value of his adjoining property covered by the mortgage. That evidence was rejected. The plaintiff was then asked if he had an interview with the officers of the defendant in reference to the removal and the re-establishment of the depot. This question was objected to, and the only ground assigned was, "as it is in writing." No proof of that was given; the case shows nothing but the assertion of the party objecting, and thereupon the witness was not permitted to answer the inquiry, whether he had an interview, at all. He was then asked what reasons they assigned for removing the depot and refusing to bring it back, and this was excluded. And in the end the plaintiff was nonsuited because he had given no proof of a tort or a fraud. He now insists that he was first debarred from giving such proof, and then nonsuited because he had not given it.

The exclusion of proof of the contract for re-establishing the depot, and the wilful and intended breach of that contract, brings up for our consideration the question principally argued. Such exclusion must rest for its justification upon the theory of the defendant's counsel, already adverted to, which we are troubled to reconcile with his concession that a cause of action was alleged in the complaint. At the foundation of every tort must lie some violation of a legal duty, and, therefore, some unlawful act or omission. Cooley on Torts, 60. Whatever, or however numerous or formidable, may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended,

or the means by which it was to be accomplished, are shown to be unlawful. *O'Callaghan v. Cronan*, 121 Mass. 114; *Mahan v. Brown*, 13 Wend. 261. The one separate and distinct unlawful act or omission alleged in this complaint, or rather the only one so separable which we can see may have been unlawful, was the unreasonable delay in restoring the depot to its original location; and that was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff. The instigation of the sale on foreclosure, as a separate fact, may have been unkind or even malicious, but cannot be said to have been unlawful. The mortgagee had a perfect right to sell, judicially established, and what it might lawfully do, it was not unlawful to ask it to do. The act of instigating the sale may be material and have force, as one link in a chain of events, and as serving to explain and characterize an unlawful purpose, pursued by unlawful means; but, in and of itself, it was not an unlawful act, and cannot serve as the foundation of a tort. *Randall v. Hazeltin*, 12 Allen, 412. We are forced back, therefore, to the contract for re-establishing the depot and its breach as the basis or foundation of the tort pleaded. If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established, to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that upon a breach of the contract there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused; there is constructive fraud, or a negligence that operates as such, and it is that fraud and that negligence which, at bottom, makes the breach of contract actionable as a tort. *Coggs v. Bernard*, 2 Lord Raym. 909; *Orange Bank v. Brown*, 3 Wend. 161, 162.

So far we see no reason to disagree with the learned counsel for the respondent save in one respect, but that is a very important one. Ending the argument at this point leaves the problem of the case still unsolved. If a cause of action for a tort, as is admitted, was stated in the complaint, it helps us but little to learn what it was not, and that it does not fall within a certain class of exceptional cases, and cannot be explained by them. We have yet to understand what it is, if it exists at all, as a necessary preliminary to any just appreciation of the relevancy or materiality of the rejected evidence. The General Term,

as we have remarked, described the tort pleaded as a "clear case of fraud." If that be true, it cannot depend upon a fiduciary or other character of the relation constituted by the contract merely, for no such relation existed; and there must be some other relation not created by the contract alone, from which sprang the duty which was violated. Let us analyze the tort alleged somewhat more closely.

At the date of the contract, the complaint shows the relative situation and needs of the two parties. The railroad company desired to close the draw over the Nepperhan river, and substitute a solid bridge. With the growth of its business, and the multitude of its trains the draw had become a very great evil, and a serious danger. The effort to dispense with it was in itself natural and entirely proper. On the other hand the plaintiff was both a riparian owner above the draw, and likely to be injured in that ownership by a permanent bridge, and had suffered, and was still suffering from a severe depreciation in the value of his property near Main street by the previous removal of the railroad station. The defendant was so far master of the situation, that it could and did shut up the plaintiff to a choice of evils. He might insist upon the draw, and leave his mortgaged property to be lost from depreciation, and save his riparian rights, or he might surrender the latter to save the former. This last was the alternative which he selected, and the contract of 1877 was the result. In the making of this contract there was no deceit or fraud, and no legal or actionable wrong on the part of the defendant. If it drove a hard bargain, and had the advantage in the negotiation, it at least invaded no legal right of the plaintiff, and he was free to contract or not as he pleased. The complaint does not allege that at the execution of this agreement there was any purpose or intention of not fulfilling its terms. The tort, if any, originated later. What remains then is this: the railroad company conceived the idea of closing Main street to any travel where it passed their tracks at grade; of substituting a bridge crossing in its stead; and of fencing in its track along the street beneath, so as to compel access to the cars through its depot in such manner that the purchase of tickets could be compelled. This in itself was a perfectly lawful purpose. The grade crossing was a death-trap, and the interest of the company and the safety of individuals alike made a change desirable, and the closing in of the depot was in no sense reprehensible. But there was a difficulty in the way. This plaintiff again stood as an obstacle in the path. The closing of Main street, though beneficial to the company, was to him and his adjoining property claimed to be a very serious injury. He declined to consent, except upon the condition of an award of heavy damages, and in dread of that peril the common council refused to pass the necessary ordinance. At this point, according to the allegations of the complaint, if at all or ever, arose the tort. It is alleged that the defendant, in order to reach a lawful result, planned a fraudulent scheme for its accomplishment by unlawful means, and through an injury to the plaintiff, which would strip him of

his damages by a complete sacrifice of his property. That plan was executed in this manner. The company wilfully and purposely refused to perform its contract. It had built its permanent bridge over the Nepperhan, and so received the full consideration of its promise; its new depot was substantially finished and ready for occupation; and no just reason remained why its contract should not be fulfilled. But the company refused. It did not merely neglect or delay; it openly and publicly refused. The purpose of that public refusal was apparent. It was to drive the plaintiff's mortgagee to a foreclosure; it was to shut out from plaintiff that appreciation of his property which would enable him to save it; it was to strip him of it, so as to extinguish the threatened damages, and thus procure the assent of the common council, and get Main street closed. This unlawful refusal to perform the contract, this deliberate announcement of the purpose not to restore the depot, was well calculated to influence the mortgagee toward a foreclosure. But the defendant's direct instigation was added. The foreclosure came; the mortgagee bid in the property at a sacrifice; swiftly followed a release of damages, an ordinance of the common council, the closing of Main street, and then the restoration of the depot.

We are thus able to see what the tort pleaded was. It was not a constructive fraud, drawn from the violation of a duty imposed by law out of some specific relation of trust and confidence, but an actual and affirmative fraud; an alleged scheme to accomplish a lawful purpose by unlawful means. There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that and outside of that there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time, and circumstances and conditions; so inwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission.

It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the cases referred to in the respondent's argument, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to

respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights as not to injure another. *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 188. Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society. It is then doubtless true, that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that if "a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract." It is no difficulty that the mortgagee's agreement to give time, and postpone the sale for plaintiff's benefit was invalid, and a mere act of grace which could not have been compelled. If it is made plain that the mortgagee would have waited but for the fraudulent scheme and conduct of the defendant, that is enough. *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 83. Nor is it a difficulty that the injury suffered was the result of a series of acts some of which were lawful and innocent. *Cooley on Torts*, 70; *Bebinger v. Sweet*, 1 Abb. N. C. 263.

Assuming now that we correctly understand what the tort pleaded was, and which was conceded to constitute a cause of action, it seems to us quite clear that the plaintiff was improperly barred from proving it. From the very nature of the case a fraud can seldom be proved directly, and almost uniformly is an inference from the character of the whole transaction, and the surrounding and attendant circumstances. Proof of the contract and its breach, of the delay in restoring the depot and the reasons therefor were essential links in the chain. If the proof should go no further, a nonsuit would be proper, but without these elements the tort alleged could not be established at all. And so the situation of the parties as it respected their several properties, the existence of the mortgage, the agreement to postpone the sale were elements of the transaction proper to be shown. The plaintiff's interview with the officers of the defendant company, and their statement of the reasons for refusing to restore the depot, were improperly excluded. While we cannot know what it was which actually occurred, it is very plain that their statement of reasons would bear materially upon the issues involved.

We are not concerned with the question of the wisdom of the plaintiff's choice of his form of action, or of what may result if the cause

of action pleaded as a tort shall be hereafter assailed, instead of its sufficiency being conceded. It may well be that he has chosen the one most difficult to maintain, and that an action upon one or more of the contracts would be less surrounded by difficulties. But we have nothing to do with his choice. He is entitled to prove his cause of action if he can.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except RAPALLO and MILLER, JJ., not voting.

Judgment reversed.

I N D E X.

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